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In The

Supreme Court of the United States

October Term, 1995

JAMES LEE FOSTER, Sheriff of Newberry County; CHARLES M. CONDON, Attorney General of South Carolina; and JAMES W. JOHNSON, JR., Circuit Court Judge of South Carolina,

Petitioners,

versus

DARRELL WAYLAND GILLIAM, JR., JAMES MATTHEW SWAIN, and PAMELA OWINGS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the double jeopardy clause prevents the State from having one complete trial to convict those it accuses of a crime where an earlier mistrial was declared due solely to the actions of the defense counsel?

II. Whether the Court of Appeals disregarded the mandate of the court in *Arizona v. Washington*, 434 U.S. 497 (1978), in failing to accord proper deference to the state trial judge's determination of the need for a mistrial based on defense counsel's actions?

III. Whether the Court of Appeals undermined principles of comity and federalism as mandated in *Younger v. Harris*, 401 U.S. 37 (1971), by its extraordinary interference with a pending state court prosecution and substitution of its own determination of the effect of defense error in derogation of the state trial judge's contemporaneous determination?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, above named, through the Attorney General of South Carolina, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 75 F.3d 881. (App. *infra*, 1-119). The order of the district court of July 28, 1995, is unreported and set forth in the appendix at 120-154.

The court of appeals previously entered an order staying the mandate on February 20, 1996, which is unreported and included in the appendix at 155. An application to stay the district court order was previously ruled upon in this Court on August 17, 1995, and is reported at 116 S.Ct. 1. The previous order of the court of appeals denying the stay request is reported at 63 F.3d 287. The court of appeals' *en banc* order staying the state court prosecution is reported at 61 F.3d 1070. The orders of the district court and report of the federal magistrate with respect to the stay are unreported and set forth in the appendix at 233, 241, respectively.

JURISDICTION

The court of appeals entered its *en banc* opinion on January 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . . "

28 U.S.C. Section 2283 provides:

> A court may not grant an injunction to stay proceedings in a state court except as authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. Section 2254(d), which states in relevant part:

> In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court, a determination after a hearing on the merits of a factual issue made by a state court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable or adequate written indicia, shall be presumed to be correct, unless. . . .

STATEMENT OF THE CASE

The State of South Carolina is currently in trial in Newberry County, South Carolina, involving the three named defendants, Darrell Wayland Gilliam, Jr., James Matthew Swain, and Pamela Owings. Pursuant to the Order of the United States Court of Appeals filed July 20, 1995, as amended July 28, 1995, the State Court prosecution was enjoined "until the District Court rules on the merits of the Habeas Petition," after the state had rested in its prosecution. The jury is currently not sequestered but still subject to continuing its service on this prosecution. On July 21, 1995, an expedited hearing on the pending Federal Habeas Corpus Petition was heard in the United States District Court. At the conclusion of the hearing, the Federal District Court entered an oral Order granting the Writ. On July 28, 1995, the Court reduced its Order to writing. The State of South Carolina, through the named parties, appealed to the United States Court of Appeals for the Fourth Circuit. On January 29, 1996, the

Court of Appeals entered its *en banc* Order, 8-5, upholding the grant of habeas corpus precluding the State to have the complete trial. 73 F.3d 881.

1. The Mistrial of December 1994.

In December 1994, the three defendants went to trial on Indictment No. 93-GS-36-70 charging the crime of murder against Gilliam, Swain, and Owings; lynching on Gilliam, Swain, and Owings; and assault with intent to kill on Swain and on Indictment No. 93-GS-36-183 charging indecent exposure on Gilliam. The matter was initially heard before the Honorable James W. Johnson, Jr., Resident Judge of the Eighth Circuit in Newberry County, in December, 1991, but resulted in a mistrial, upon the prosecution's motion when the State trial judge determined that the defense counsel presented to the jury crime scene photographs when the particular photographs had not been introduced into evidence as required by State law and procedure. J.A. pp. 86-94. See also J.A. pp. 35-46. App. 264-270.

The State submits that a review of the Record now before the Federal Courts reveals that there appears to be no significant question concerning the criminal Defendants' participation in the events. It appears that the trial in December 1994 was going to focus on the issues as to whether the actions leading to the victim's death had been taken in self-defense or had been provoked and the location of the participants at the time the crime occurred. On the third day of the trial, the State presented the testimony of Officer Charles Counts of the South Carolina Law Enforcement Division. Officer Counts had been present at the crime scene soon after the shooting and certain exhibits were presented through his testimony to the jury and the Court. On direct examination, Officer Counts testified that at approximately 6:00 P.M. on January 5, 1993, he appeared at the crime scene. He reported that the Sheriff's Office had secured the area

with crime scene tape. He appeared there with Agent Gainey and in the State's case testified that he had secured a logging chain, a hat, a rifle, and described the location of those particular items. (On cross-examination, Owings' defense counsel, Sam Price, inquired as to whether Officer Counts had found any blood on the exterior). Officer Counts stated that "I would have to refer to the photographs I have to positively tell you the area." At that point, Mr. Price provided some photographs to the witness. The following colloquy occurred in the Record.

> MR. ROBERSON: Do you mind if I see those?
> (Photographs were handed to Mr. Roberson)
> MR. ROBERSON: Just one minute.
> (Pause)
> MR. ROBERSON: Without objection.
> THE COURT: Were those being offered at this time?
> MR. PRICE: No, sir. We were just using these to refresh Mr. Counts' recollection.
> MR. ROBERSON: I'm sorry. That was premature.
> THE COURT: That's fine. Mr. Price.

(Petitioners' Exhibit No. 4; Tr. pp. 12-13; Tr. p. 273). J.A. pp. 60-61. Further, during Mr. Price's cross-examination, Mr. Counts was asked to look at those photographs to determine if he was able to refresh his recollection as to whether or not any blood was found at the scene. Mr. Counts stated that he was not a serologist but there was a red substance that appeared to be blood found at the scene. (Petitioners' Exhibit No. 4, p. 13; Tr. p. 274). J.A. p. 61. He stated in general terms that when they find blood outside the trailer and it indicates blood, it is typically marked by circling the area and surrounding it with crime scene tape or they would cone out or do something to keep individuals from walking and disturbing that. Agent Counts was subjected then to the further questions:

Q. Based on those photographs that you have used to refresh your recollection, do you see such a photograph that would indicate that citing of blood that was marked?

A. Yes, sir. I could.

Q. If you could, *hand us that*. If you could, flip through and find the photographs or photographs that would indicate that.

A. Basically all of these is the same area where blood was found. Just overall views of it.

Q. I hand to you what has been marked Defendant's Exhibits 16, 8, 13, 12, and 14. Would it be your testimony that those shots mark the finding of blood but just from different angles?

A. Yes, sir. I can't tell you that that substance is in fact blood. I am not a serologist, but I can tell you that these were photographs that myself or Agent Gainey of SLED took and the substance resembles blood, and these five photographs depict the same area adjacent to the trailer where we found substance that resembled blood.

Q. Alright, sir. *Using those photographs*, if you step down here to this drawing, this obviously a not to scale drawing, but to the best of your ability with this matter, if you could mark what you believe to be the location of those what we think is blood but are not certain is blood? And I am moving the . . .

Petitioners' Exhibit No. 4, p. 14; Tr. pp. 274-275). Emphasis added). J.A. p. 62. Officer Counts then placed upon the diagram certain matters involving the location of blood as depicted from those introduced photographs. Petitioners' Exhibit No. 4, pp. 16-17; Tr. pp. 276-277). J.A. pp. 64-65. Subsequently, Mr. Mills, on behalf of Gilliam, did cross-examination and published some photographs

to the jury by handing the photographs to the jury. (Petitioners' Exhibit No. 4, p. 21; Tr. p. 282). J.A. p. 69. During Counsel Goodwin's cross-examination of Mr. Counts, she moved into evidence Photograph Nos. 8, 12, 13, 14, and 16, Exhibit Nos. 20, 44, 45, 46, 29, and 30. (Petitioners' Exhibit No. 4, pp. 29-33; Tr. pp. 290-295). J.A. pp. 77-81.

The prosecution then made redirect examination of Agent Counts and then his testimony was completed. (Petitioners' Exhibit No. 4, pp. 36-37; Tr. pp. 297-298). J.A. pp. 84-85.

a. The Motion for a Mistrial.

The jury then received instructions and was dismissed for lunch. Subsequently, out of the presence of the jury, the Court brought to the attention of the parties that photographs marked *but not introduced* as Defendants' Exhibit Nos. 9, 10, 11, 15, 17, 18, and 19 were reported as having been seen by the jurors. It was further stated that the jurors had looked at pictures which had been placed in a stack of pictures on the corner of the bar of the jury box. The prosecution argued that defense counsel had placed within the jurors' accessibility matters which were not in evidence and because they had seen something that had not been admitted into evidence that was improper and moved for a mistrial. (Petitioners' Exhibit No. 4, p. 39). J.A. p. 87. App. 264.

Defense Counsel Goodwin took exception to the assertion that the defense had placed pictures on the bar and suggested it may have been someone else from the State and asserted that the witness had testified about the pictures and had identified them and requested to recall him and move them into evidence. They asserted there was no grounds for a mistrial. (Petitioners' Exhibit No. 4, p. 40). J.A. p. 88. Each of the defense counsel asserted that they had not done it and asserted that they did not see any prejudice in the matters. Particularly, Mr. Price

asserted that he was the attorney who gathered the photographs and presented them to Mr. Counts. His recollection was that they were not moved into evidence by Ms. Goodwin but were left there on the witness stand. "Now, that was certainly sloppy housekeeping and I take responsibility for that, but that was certainly not a tactical move to put anything before the jury." (Petitioners' Exhibit No. 4, p. 41, lines 15-25). Counsel Price further similarly did not have any recollection of himself or anyone else in the courtroom bringing them before the jury. J.A. p. 89. App. 266.

Prosecutor Strom stated that whether it was an intentional act or an inadvertent act, the prosecution took the position that they had a duty to make sure that there was no evidence accessible to that jury that is not admitted into evidence, that it was a serious matter, and that the State strenuously requested a mistrial. (Petitioners' Exhibit No. 4, p. 42). J.A. p. 90. App. 266. Testimony was received from the jury foreman that all photographs had been circulated to the jury. J.A. p. 92. The Court then gave all parties what he later described as a "full opportunity to explain their positions." (Amended Order of May 15, 1995, p. 4). J.A. pp. 38, 92-94. After considering and rejecting the alternatives requested by defense counsel, the trial judge declared a mistrial. J.A. p. 94. App. 259-263, 269-270.

b. The Order Denying the Request to Bar Prosecution.

On March 6, 1995, the defendants filed a Motion in State Court asserting that the Double Jeopardy Clause barred retrial by the prosecution. On May 15, 1995, the State trial judge in a written Order rejected the Double Jeopardy claim, finding that "manifest necessity" required the declaration of a mistrial. The State Court made a specific finding of prejudice to the government as a result of the defense counsel's actions and explained in

detail why it rejected alternatives of a curative instruction or recall of a witness to allow defense counsel to introduce the photographs. J.A. pp. 38-41. The Petitioners sought an interlocutory appeal to the Supreme Court of South Carolina, which it dismissed as interlocutory on May 31, 1995. J.A. p. 47. App. 256.

2. The Pending State Trial.

Subsequent to the denial of the earlier Stay Request of the panel of the United States Court of Appeals, the prosecution began on Monday, July 17, 1995. The original trial judge, the Honorable James W. Johnson, Jr., recused himself from the new prosecution in the case, upon information and belief, because he was a named Respondent in the Habeas actions. The Honorable Marc Westbrook, of Lexington County, replaced him in the trial on these indictments. During the trial, outside of the presence of the jury, the prosecution was given the opportunity to note objections to certain photographs. J.A. p. 816.

At that trial, Solicitor Townes Jones argued that certain photographs (which are the same challenged photographs in these proceedings) were objected to because they were cumulative and are, in our opinion, confusing. J.A. pp. 816-818. Solicitor Jones asserted that they depicted in some instances orange or red colored substances that they believe the defendants will attempt to solicit testimony from this witness by way of implication that this might be blood. J.A. 816. He asserted that they should be objected to because it hasn't been tested and there is no evidence that it is blood.[1] Similarly, he objected to certain evidence of what were asserted to be tire tracks based upon the Record before the Court of

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[1] While the matter was on appeal to the Court of Appeals, it was determined that serological tests had earlier been done on the swabs and indicated it was human blood. This information had not previously been disclosed to the trial judge, prosecutors, or defense counsel.

photographs of some tape, and while he did not object to some other photographs, he was objecting to these photographs because they add to what quite frankly "already presents a confusing picture" to the jury. J.A. pp. 816-817.

Defense Counsel Goodwin, for defendant Swain, asserted the reasons why she was of the opinion that this evidence was probative and relevant and should be introduced as well as the other defense counsel. The State prosecutor asserted in his objection that the defense was trying to contend that the substances shown in the photographs were blood belonging to Wayland Gilliam, but not analyzed. He contended that because it looked like blood when positioned next to the rust-colored substance that was next to it, the defense would try to use the photographs without foundation that it is blood to argue to the jury that it is blood. J.A. pp. 822-823.

Judge Westbrook asserted that they had entered an area of evidentiary law defined by Judge Epps as "the for what it is worth standard" and while not exactly understanding what these challenged photographs would add, believed it would be appropriate to allow them to be introduced. He concluded that for whatever reason that someone took the trouble to put the tape around to identify the particular area, he did not think the prejudicial nature of the photographs would tend to outweigh the probative value or substance of probative value or the right of the defense to cross-examine the witness as to these particular documents. While he wasn't clear that it would add anything to the case, he thought the defense had a right to go into it and have them introduced.[2] J.A. pp. 823-824.

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[2] It should be noted that in Judge Wilkins' statement on the earlier *en banc* Order, he stated that in the new trial "the photographs at issue here were identified by the same Officer Counts, offered into evidence by the defense, and admitted without objection from the State." 61 F.3d 1078. As revealed by the Transcript of the ongoing State criminal proceedings, Petitioners submit that this statement is in error and in fact the

When the *en banc* Court enjoined the State trial on July 20, 1995, the State of South Carolina had rested its case. After the District Court held its hearing and orally granted the Writ of Habeas Corpus, the State trial judge apprised the jurors that certain legal matters had occurred and they were not to read or discuss any matters about the case. The state trial judge did not release the jurors from their obligations and duties in this ongoing trial. The jurors are *not* currently sequestered.

3. The Federal Habeas Corpus Proceedings.

On June 6, 1995, the three Petitioners made separate Federal Habeas Corpus actions in the United States District Court. A Rule to Show Cause was filed giving the State Respondents in the action until June 30, 1995, to file a Memorandum and Motion for Preliminary Injunction or Restraining Order or Stay of the State Court Proceedings, and until July 31, 1994, to make a return to the merits of the Petitions. On June 30, 1995, Respondents made opposition to the requests to enjoin the State Court trial proceedings schedule to begin July 17, 1995. On July 7, 1995, the United States Magistrate Judge entered a report recommending the Stay be granted. On July 10, 1995, objections were made to the Magistrate's Report and a hearing in the matter of the Stay was held before the Honorable Joseph F. Anderson, Jr., United States District Judge. At the conclusion of the hearing, he denied the Stay Request. On July 11, 1995, Judge Anderson entered a written Order in the matter. App. 233-234.

The Order denying the Stay was taken to the United States Court of Appeals. On Saturday, July 15, 1995, a panel from the Fourth Circuit heard arguments and orally affirmed the District Court. A Request for Reconsideration *en banc* was subsequently made. On Thursday, July

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objection was made prior to the offer into evidence or its admission.

20, 1995, the Clerk of Court advised the State Trial Court, Judge Westbrook, that the United States Court of Appeals, had granted a temporary restraining order enjoining the State criminal proceedings until the District Court rules on the merits of the Habeas Petition and "as expeditiously as possible, the District Court is directed to receive such evidence and take such testimony as necessary and to rule on the merits of Petitioners' Habeas Petition." 61 F.3d 1074. The *en banc* Court vote was 8-5. Separate statements in dissent by two original panel members, Judge Luttig and Judge Wilkinson, were issued. Judge Wilkins entered a statement in support of the action of the Court. On July 21, 1995, while the District Court hearing was proceeding, Judges Russell, Widener, and Niemeyer also entered statements. On July 25, 1995, the statements of Judges Wilkins and Luttig were amended. App. 188-232.

Upon receipt of the decision of the *en banc* Court at 6:30 P.M., July 20, 1995, the state trial judge was advised to direct trial counsel from the Newberry trial to appear in Federal District Court in Columbia at 3:00 P.M. the next day, July 21, 1995. The jury was sequestered at that point.

On July 21, 1995, the State made their Return to Petition. A hearing was convened on that same date. Testimony was received from five (5) individuals and further documentary evidence was received. The hearing began at 3:00 P.M. and concluded at approximately 10:30 P.M.

During the hearing on July 21, 1995, testimony was received from Samuel Price, J. Christopher Mills, Michael Coulter, Timothy Woolston, Betty Strom, and John Delgado. J.A. pp. 277-481. Mr. Price, Petitioner Owings' attorney, testified about his handling of the photographs. On cross-examination, Mr. Price testified about the differences between the photographs which resulted in the mistrial and the photographs properly introduced. Particularly, he conceded that he could not see the same

number of "red dots" in Exhibit 12 as in Exhibit 10. J.A. p. 317. Mr. Price acknowledged that he never sought to introduce the photographs into evidence. However, counsel Price stated that certain unadmitted exhibits were helpful to the defense. Exhibit 10 was a "close-up that shows a red substance that would appear to be blood." J.A. pp. 105, 324. Counsel Price stated the following as to whether a jury could be confused by the photographs and the variances between the admitted and unadmitted pictures:

> I spent a lot of time with these getting ready for this trial. It could be argued that a jury would be confused if we had both sets. It could be argued that they would be confused if they had only one set.

J.A. p. 326. The witness further declared the unadmitted Exhibit 9 photograph was useful to the defense because it revealed a tire track that was not analyzed. J.A. pp. 105, 327. He asserted Exhibit 15 would be useful because it would reveal where the truck was parked and asserted a position that "the blood was coming from defendant Gilliam would be located in the area where he got in the truck." J.A. pp. 106, 328. "I think clearly it helps the defense if the jury has a clearer understanding of the truth defense. . . . " J.A. p. 329. He stated that unadmitted Exhibit 11 was similar to Exhibit 9 and generally showed the same thing. J.A. pp. 106, 327, 329.

Concerning unadmitted Exhibits 17, 18, and 19, counsel Price stated that it shows [the blood drippings] more clearly and more precise than in the other admitted photographs. J.A. pp. 107-108, 329. Counsel conceded that in some of the admitted photographs "it would be difficult to see the red dots within the circle of the yellow tape." J.A. pp. 329-330. Counsel further conceded that the photographs appear to represent a number of circles, but it is only two. J.A. p. 334. Further, he acknowledged that he could only see red dots in one photograph that was admitted and not in others. J.A. p. 334.

The State called Michael T. Coulter to testify. He is an Assistant Solicitor who only participated in the second trial. The basis of his testimony was to establish that in the on-going trial, the photographs in Photo Set One, which had not been admitted in the first trial, were timely objected to prior to any admission in the current trial. J.A. pp. 347-348.

Betty Strom, the Deputy Solicitor who moved for the mistrial, testified next. She stated that the prosecution's theory of the case was that an incident occurred at the mobile home residence of Ernest Silvers. Evidence revealed that Swain and Gilliam had arrived at the residence in Gilliam's truck and were in his yard and roadway swearing and challenging people inside the trailer to come out. Evidence revealed that Owings threw a heavy logging chain to Gilliam. At that time, someone inside the residence threw a lead pipe to Tony Hunnicutt who was in the yard after he heard Gilliam's comments about his dead brother. Evidence further was that Gilliam had exposed himself to the trailer residents, including women and children. Swain was seen with a rifle sitting in Gilliam's truck that was parked in Silvers' driveway. Subsequently, Ernest Silvers was brought home by Otis Jennings. Jennings left slowly to insure that Silvers got inside the trailer. J.A. pp. 379-383.

According to Ms. Strom, Silvers went to the door of his home and told the three defendants to leave the premises. Silvers had a shotgun in his hand. There were then two shots. Silvers was shot in the upper chest and died. Defendant Gilliam was injured in the lower part of his leg. J.A. p. 382.

According to Ms. Strom, before the case was mistried, the defendants' theory of the case was to present a defense of self-defense. The location of the particular defendants was in dispute with some testimony putting Gilliam in the Silvers' yard and other witnesses placing him on the roadway. Further in dispute was where the

truck was parked on either Silvers' property or a neighbor's property. J.A. pp. 382-383. According to her, the prosecution's case at the time of the mistrial was about half way through. J.A. p. 384.

Ms. Strom stated that the case had earlier involved an incident where one of the defense counsel had been seen looking through the prosecution's notebooks which she had brought to the court's attention. J.A. pp. 384-385. Subsequently, Judge Johnson brought to their attention after a lunch recess that the court reporter had recovered from the railing of the jury box a stack of photographs which included several that had not been introduced. J.A. p. 385. Ms. Strom considered the judge's request that he would consider any appropriate motions as an invitation for a motion for a mistrial. J.A. p. 385.

She stated that she had discussed this request with John Delgado and Nathaniel Roberson who were assisting in the prosecution at the request of the victims.

> My concern was to put it basically the integrity of the court process. Matters had been seen by the jury that had not been properly admitted into evidence. I was concerned that the rules of court and rules of evidence had been circumvented. I did not see a way to cure that. The only way I knew to get resolved and have something done about it was to ask the court for a mistrial.

J.A. p. 386. It was her position that defense counsel put this evidence before the jury. Further, she stated that at the time of the trial the prosecution did not know if any of the red spots were in fact blood. J.A. pp. 387-388.[3]

Further, Deputy Solicitor Strom testified that if the seven (7) photographs would have subsequently been

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[3] As stated in footnote one, it was not until the appeal that the parties became aware that the swabs had earlier been tested and human blood was found.

introduced, it was her opinion that it would have over-emphasized those pictures and possibly caused the jury to place more emphasis on them. Similarly, she feared that a curative instruction would have only re-emphasized the thing that the jury was told not to hear. J.A. p. 389.

Deputy Solicitor Strom further testified that her review of the unadmitted photographs, except for one where the trailer is seen, could lead to a misinterpretation of the precise location. Further, she acknowledged that there are matters in the unadmitted photographs that cannot be seen in the admitted photographs.

Further, Deputy Strom testified that on January 5 there was an incident between Hope Icard and Christy Gilliam which resulted in physical injury. She stated that these altercations occurred near the area of the suspect crime scene photographs. J.A. pp. 422-423.

John Delgado testified that he became involved in the prosecution at the request of Ernest Silvers' widow, along with Nathaniel Roberson. J.A. p. 427. Mr. Delgado stated that he was motivated to move for the mistrial for several reasons. First, he thought the evidence had been improperly admitted and thought it was a serious violation of the procedure. Further, he thought it was clear that Judge Johnson was looking to the prosecution for the motion. He thought that the integrity of the system had been breached. J.A. pp. 429-430. Counsel Delgado further described his prior experience in seeking the final argument to the jury as a defense counsel even though he introduced evidence in the state's case. J.A. pp. 430-431.

The Petitioners called J. Christopher Mills, who testified about his recollection concerning the introduction of the challenged photographs in the second trial. J.A. pp. 442-446. Counsel Mills clearly testified that when it came time to introduce the photographs, there was no doubt in his mind that the prosecution objected to their introduction. J.A. p. 446.

After hearing arguments by each side, the court initially announced an oral ruling granting the writ of habeas corpus. J.A. pp. 475-481. The District Court found that it was defense counsel who caused the mixup resulting in the photographs being exhibited to the jury. Particularly, he found that the state had moved for the mistrial and it was invited by the state judge. Further, he found no misconduct, no bad faith or otherwise inappropriate behavior by the prosecution in either the first or second trial. Also, he determined that the prosecution in the second trial did object to the introduction of the challenged photographs. J.A. p. 477. The District Court rejected its earlier conclusion that the defense might have been able to make the last argument because state law has clarified the confusion and the District Court felt that absent that argument the petition must be granted. J.A. p. 479.

After the appeal was taken, the District Court entered a full written Order on July 28, 1995. App. 120-154. In his Order supplementing his oral findings, the District Court asserted that the prosecution had not identified any characteristics of the photographs that would make the jury's viewing of the photographs unduly unfair to the prosecution. J.A. p. 504. App. 140. The District Court further rejected the claim that the jury could be confused about the location of the blood spots. App. 142-43. The court further rejected the prosecution's argument that manifest necessity was shown by the trial court's authority to control its procedures for admitting evidence or the judge's exploration and rejection of the possibility of a curative instruction or recalling Officer Counts. J.A. pp. 511-512. App. 147-150. The District Court further concluded that the case fell within an extraordinary circumstances exception of *Younger v. Harris*, 401 U.S. 37 (1971). J.A. pp. 513-515. App. 150-53.

a. The Court of Appeals' Opinion.

On January 29, 1996, the Court of Appeals issued its *en banc* decision, again rejected the State's position in an 8-5 split. The majority held that retrial of the defendants was barred finding the state trial court had not exercised sound discretion in granting the mistrial after the jury was erroneously allowed to view unadmitted photographs. 75 F.2d at 894-903. Rejecting the state judge's analysis of the photographs, the majority found that the photographs were relevant and admissible as a matter of state law and were not prejudicial. 75 F.3d 900-901. The majority further rejected the State's position that the *Younger v. Harris* abstention doctrine did not prevent equitable intervention into the state proceedings as intervention was necessary to protect the defendants' Fifth Amendment rights. 75 F.3d at 903-905. App. 28-55.

In dissent, Circuit Judge Wilkinson concluded that the majority had disregarded the mandates of *Younger v. Harris, supra,* and *Arizona v. Washington,* 434 U.S. 497 (1978). The dissenting judge stated "when a mistrial is declared through no fault of the prosecution and indeed as the direct result of defense error, a federal court may not enjoin a subsequent state criminal trial while it is ongoing." 75 F.3d at 905. App. 57. Judge Wilkinson further summarized the dissenters' position that the majority decision had made significant damage to the *Younger* abstention doctrine by creating a duty on the part of the federal courts to intervene in ongoing state criminal proceedings even when the defense error caused the earlier mistrial despite the fact that there was nothing in the record to suggest bad faith or improper motive on the part of the prosecution in requesting the mistrial. Judge Wilkinson further contended that the majority erroneously created a broad exception to *Younger* whenever a double jeopardy claim is raised, even though it does not address prosecutorial overreaching. 75 F.3d at 905-907. App. 57-61. Further, the majority sanctioned the disruption of state criminal proceedings and disregarded the

principles of comity and federalism. Further, the disruption of the state courts in this matter is precisely what the *Younger* doctrine sought to avoid. App. 62-65.

Judge Wilkinson further found that the majority damaged the doctrine of *Arizona v. Washington, supra*. The majority failed to give "the highest degree of respect" to the state trial court's judgment on the manifest necessity where it "takes its seat on the state trial bench" and reviews every item of evidence in astonishing, yet "exacting and meticulous" way. 75 F.3d at 909-910. App. 65-67. The lack of any deference given to the state trial judge also went to the rejection of the alternatives. The majority refused to accord the state judge with appropriate deference in his attempt to gain control of the courtroom and not countenance the threat to the integrity of the trial proceedings. 75 F.3d at 911. App. 68-70. Judge Wilkinson concluded that the majority decision will undermine the ability of state court judges to declare mistrials and force them to tolerate errors rather than risk the costs of remedying them. 75 F.3d at 912-913. App. 73-75.

Judge Niemeyer dissented and held that absent any indication of prosecutorial misconduct or judicial overreaching on behalf of the prosecution, the Double Jeopardy Clause permits the state one complete trial to convict those it accuses of crime. 75 F.3d at 913. App. 76-77. Judge Niemeyer concluded that the majority overruled the trial judge's discretionary ruling on evidence and trial conduct rather than yield to his sound discretion. Further, the denial of one complete trial in the absence of judicial or prosecutorial misconduct overlooked the limitations inherent in the principle of manifest necessity. He concluded that public justice demands and the Double Jeopardy Clause permits one complete trial for the three defendants rather than release them into the public. 75 F.3d at 915. App. 77-80.

Judge Luttig also authored a dissenting opinion which found the majority "in confident disregard of the

Chief Justice and the Court" completed the wholesale substitution of its judgment for that of the state trial judge on whether the jury was potentially prejudiced by viewing the unadmitted crime scene photographs. 75 F.3d at 915. App. 81-82. He found that the majority had utterly disregarded the mandate of the court in *Arizona* and *Younger*. He determined that the majority's error is plain where only the state trial judge could possibly assess the potential impact of these unadmitted photographs on the jury and disruption on the state proceedings could not be any greater. 75 F.3d at 917. App. 82-86.

Judge Luttig further rejected the majority's conclusion that the state trial judge acted "precipitately" where the trial judge actually made an extensive explanation of its reasons for granting the mistrial in its written order. 75 F.3d 918-919. App. 88-91. Judge Luttig also determined that there was potential prejudice that inhered in the unadmitted photographs. Judge Luttig found the relevant question was not whether the photographs would have been admissible, but rather whether it was an abuse of discretion for the state trial court to decline to formally consider their admission after they had already been seen by the jury. 75 F.3d at 923. App. 103. Judge Luttig found four (4) sound reasons why the trial judge could decline the cure of the error by recalling Officer Counts and having the photographs attempted to be admitted. He found the trial court was not required to attempt this cure, even though the majority might have done so than the trial court in *Arizona* would have been required to give a curative instruction. App. 103-04.

Judge Luttig found the case squarely controlled by *Arizona* and contrasted it with the instant case and found the reasons for reversing the *en banc* court even more compelling than they were in *Arizona*. App. 104-110. He concluded that *Arizona* means that a federal appellate court in habeas should never find itself in the posture of comparing and contrasting individual crime scene photographs wrongfully placed before the jury by defense

counsel and determining *de novo* whether the photographs might have been admitted and whether they might have prejudiced the jury in a trial about which the appellate court knew little. 75 F.3d at 926. App. 111-12. He concluded that any reviewing court applying the teachings of *Arizona* would conclude the trial judge acted within his discretion in granting the mistrial.

On February 20, 1996, the Court of Appeals in a 10-2 order granted the State's emergency motion to stay the mandate pending certiorari review in this Court. The majority deferred to this Court's order in *Foster v. Gilliam*, 116 S.Ct. 1, 2 (1995). Judge Widener, with Judge Niemeyer concurring, held that his opinion was that the State's position for a stay was well taken and the *en banc's* opinion was not well taken. Judge Williams dissented asserting the State had failed to satisfy the traditional factors for a stay. Judge Luttig dissented concluding first that the intrusion into the sovereign affairs of the State "should continue not one day longer," that no further briefing is necessary and states the matter should receive the immediate attention of the Supreme Court. App. 155-60.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Double Jeopardy Clause permits the State one complete trial to convict those it accuses of crime, absent any indication of prosecutorial misconduct or judicial overreaching.

On January 5, 1993, Ernest Silvers was killed after he returned to his house in Newberry County. He was shot in the chest while he stood defending his home. It is undisputed that the bullet which killed him was fired by James Swain. As a result of their personal involvement in this tragedy, murder, lynching, assault with intent to kill, and indecent exposure charges were brought against Wayland Gilliam, James Swain, and Patricia Owings. If

the decision of the Court of Appeals is left to remain intact, NO JURY WILL EVER DETERMINE THE PROPRIETY OR THE CHARGES. This is an astonishing result because the apparent windfall to the defendants was not the result of prosecutorial misconduct or judicial overreaching, but instead was the result of defense counsel's neglect that resulted in the need for the state trial judge to declare a mistrial. The Double Jeopardy Clause and the mandates of this Court do not require such a result. In fact, it instructs against it.

In its Order on a prior application for a stay in this action, Chief Justice Rehnquist stated:

> The state trial court ruled against respondents' double jeopardy claims on the merits. In *Arizona v. Washington*, 434 U.S. 497 (1978), we held that one claiming double jeopardy by reason of a second trial must show that there was no "manifest necessity" for the trial court to grant the State's mistrial motion. And we stated that the trial court's judgment about the necessity is entitled to great deference, never more so that when the judgment is based on an evaluation of such factors as the admissibility of evidence, any prejudice caused by the introduction of such evidence, and the trial court's familiarity with the jurors. *Id.* at 513-514. *Washington* indicates that the State will be able to present at the least a substantial case on the merits on appeal. . . .

Foster v. Gilliam, 116 S.Ct. 1, 2 (1995). App. 161-65. In recognizing that the state trial court's judgment must be entitled to "great deference," Chief Justice Rehnquist pointed to what eventually became the defect in the Court of Appeals' *en banc* analysis. The Court of Appeals, in sharply divided decisions, ignored the teachings of *Arizona v. Washington, supra*, and substituted its assessment of the evidence for the state trial judge and sought alternatives to the mistrial rather than according the

"high degree of respect" for the trial judge's determination of the need for a mistrial. Because the teachings of *Arizona* were ignored, the majority opinion must be reversed and should be done so summarily.

The Supreme Court has held that the Fifth Amendment Double Jeopardy Clause protects against being "twice put in jeopardy of life or limb" for "the same offense" and "is not an evolving concept." *Gore v. United States*, 357 U.S. 386, 392 (1958). This Court has held that the state is entitled, absent misconduct by the prosecution or the trial judge on behalf of the prosecution, to one complete trial, and if the defendant is convicted, one punishment. Cf. *Illinois v. Somerville*, 410 U.S. 458, 463 (1973) ("the interests of the public in seeing that a criminal prosecution proceed to verdict . . . need not be forsaken by the formulation or application of rigid [double jeopardy] rules"). Where defense counsel's neglect causes a mistrial and there is no suggestion of prosecutorial misconduct or judicial overreaching, the concerns of the Double Jeopardy Clause do not come into play.

Here, the Court of Appeals ignored the principles underlying the concept of manifest necessity and its limits. In *U.S. v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824), Justice Story held that the Double Jeopardy Clause did not bar a retrial when the jury was not able to agree on a verdict. The court stated "the prisoner has not been convicted or acquitted, and may again be put upon his defence." In *Perez*, the court deferred to the sound discretion of the trial judge and stated the court may discharge juries from rendering verdicts when there is a "manifest necessity" for doing so "or the ends of justice would otherwise be defeated." The current jurisprudence of this Court supports that high degree of respect which must be given to the trial judge to ensure a "fair and proper" trial.

By failing to accord the state trial judge the level of deference in declaring a mistrial that this Court requires, the Court of Appeals has set a precedent that could infringe upon a state's interest in ensuring that those accused of crimes ultimately stand trial. By supplanting the state trial judge's decision and imposing a strict scrutiny standard for mistrial, the Court of Appeals may in the future encourage defense attorneys to step beyond appropriate boundaries of advocacy, while at the same time discouraging judges from gaining control of the courtroom.

The danger in the Court of Appeals' approach is twofold – it creates an inhibitory effect on judges and prosecutors and the opposite effect on defense counsel. Any overreaching or misconduct by a judge or prosecutor is closely examined, where limiting the trial judge's discretion will discourage the use of a mistrial by concluding that "tainted" proceedings are better than no proceedings at all. Accord *Arizona v. Washington*, 434 U.S. 497, 513 (1978) ("the adoption of a stringent standard of appellate review in this area would seriously impede the trial judge in the proper performance of his duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop professional misconduct").

II. The Court of Appeals' Opinion misinterprets the role of the federal courts under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971).

If this *en banc* opinion is allowed to stand, the federal courts will perceive a new duty to intervene in ongoing state court prosecutions even when defense counsel's error caused the declaration of the mistrial. The opinion, therefore, "turns *Younger* on its head." Here, there has been no showing of any abuse of prosecutorial power that *Younger* sought to prevent. Instead, it appears that the intervention is justified by the *en banc* court purely because it thinks the grant of the mistrial was a mistake.

Younger does not allow for such intervention into an ongoing trial. "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal relief against pending state prosecutions appropriate." *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

The *en banc* court creates a new broad exception to *Younger* abstention whenever a petitioner on habeas corpus raises a double jeopardy claim. This is wholly inappropriate, particularly where there is no accusation of misconduct by the prosecution. As the district court found, "there is nothing in the record to indicate that the prosecutors acted with bad faith or improper motive in moving for the mistrial." J.A. p. 498. App. 131. Since there is no indication that the state was attempting to receive a second shot at the defendants as a result of their own failings or misconduct, the protections of *Younger* are not implicated. To the contrary, the state trial judge declared the mistrial because he was disturbed that the integrity of the trial had been compromised by defense counsel's error in exposing the jurors to close-up photographs of the crime scene that were never admitted into evidence. The *en banc* court disregarded both the source and nature of the error. The creation of the new rule fashions a broad exception to *Younger* that may allow for federal court intrusion into state criminal trials to be the rule, rather than an extraordinary event. The intervention in the Newberry, South Carolina, trial stands as a symbol of the disruption that the *en banc* opinion would allow and the lack of respect for state courts it evidences. Principles of comity and federalism demand that the incapacity of the state courts by continuation of the *en banc* opinion's precedent be vacated.

To accept the intrusion into the state court process as the rule would either *end* the granting of mistrials over defense objection for fear of future disruptions revealed

in this case or encourage premature litigation of all mistrial decisions in federal court. The Court of Appeals ignored the wisdom of the *Younger* doctrine. It would allow for a disruption of the state trials and undermine any state's ability to enforce its own criminal laws. Thereby, the *en banc* opinion failed to show "proper respect for state functions," particularly when it allowed for the mid-trial stoppage. *Younger* clearly applies to this situation, and its hurdles must be satisfied for habeas relief to be authorized. There is no practical difference between granting habeas relief from a pending state trial and enjoining the same trial. *Kolski v. Watkins*, 544 F.2d 762 (5th Cir. 1977). The principles of comity and federalism which underlie *Younger* are present in both. Here, the state trial is currently in limbo until resolution of certiorari. Certainly, the *en banc* determination that a double jeopardy violation exists and forever bars a murder prosecution based on its own view of a response by a state trial judge to an admitted evidentiary error as being improper was wrong is the precise situation of federal interference that *Younger* sought to avoid.

III. The Court of Appeals misinterprets the role of federal courts under *Arizona v. Washington*, 434 U.S. 497 (1978), and conflicts with other circuits' opinions.

In *Arizona v. Washington*, 434 U.S. 497, 506 (1978), the court held that the phrase "manifest necessity" does not articulate "a standard that can be applied mechanically or WITHOUT ATTENTION TO THE PARTICULAR PROBLEM CONFRONTING THE TRIAL JUDGE." The court stated that a state trial judge may act within his sound discretion in rejecting possible alternatives and granting a mistrial, even where reasonable judges could differ about the proper disposition. In *Arizona*, the court stated that while some judges may have proceeded in that trial with cautionary instructions:

> In a strict, literal sense, the mistrial was not 'necessary.' Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more of the jurors may have been affected by the improper comment.

434 U.S. 511. Courts have interpreted *Arizona* previously to recognize the limits of federal review of the judge's mistrial decisions on whether his sound discretion was abused:

> Even though other judges might have used cautionary instructions or other measures short of a mistrial to correct prejudice to the jury, a judge need not expressly consider these alternatives to satisfy the fifth amendment.

Grooms v. Wainwright, 610 F.2d 344, 346 (5th Cir. 1980). While *U.S. v. Jorn*, 400 U.S. 470, 487 (1971) (plurality), suggests that alternatives to a mistrial be considered, it is also clear that the Constitution does not require canvassing of specific alternatives or articulation of their inadequacies. *Cherry v. Director, State Bd. of Corrections*, 635 F.2d 414, 419 (5th Cir. 1981); *Abdi v. State of Georgia*, 744 F.2d 1500, 1503 (11th Cir. 1984) (manifest necessity "can exist alongside less drastic alternatives, so long as the record discloses that the trial court considered alternatives before declaring mistrial").

In *Arizona v. Washington, supra*, the court recognized the public interest in "fair trials designed to end in just judgments" is not to be undermined casually. See *id.* at 516. The Double Jeopardy Clause recognizes society's interests in "giving the prosecution one complete opportunity to convict those who have violated its laws." *Id.* at 509. This is the end of public justice which must not be forsaken readily.

> The interests of the public in seeing that a criminal prosecution proceed to verdict, either of

> acquittal or conviction, need not be forsaken by formulation or application of rigid rules that necessarily preclude the vindication of that interest.

Illinois v. Somerville, 410 U.S. at 463.

The Court of Appeals, at the outset, failed to properly interpret the mandate of the court in *Arizona v. Washington* by failing to give the state trial judge's determination the great deference it was due. Virtually ignoring the fact that the jury viewed unadmitted photographs at a time when the particular photographs had not been identified and could have confused the jury, the Court of Appeals chose the course of determining ways that the state court could have further disrupted the trial to mandate the introduction of the evidence. The issue that the state trial judge was faced with as not to determine *how* to introduce the unadmitted photographs – the issue was to remedy the prejudice the improper viewing had created and ensure a fair trial for both parties and a just verdict. As the court stated in *Arizona*, the trial court's judgment is entitled to great deference, never more so than when the judgment is based on an evaluation of such factors as the admissibility of evidence, any prejudice caused by the introduction of such evidence, and the court's familiarity with the jurors. *Arizona, supra*, at 513-514. The Court of Appeals erred in failing to recognize its quest was only to determine if the state trial judge had abused its sound discretion in declaring a mistrial. The mistrial determination could be upheld, even where "reasonable judges could differ about the proper disposition." *Cherry, supra*, 635 F.2d 414 at 419. As the court recognized in *Arizona v. Washington*, the trial court's discretionary decision could be upheld even if "in a strict, literal sense, the mistrial was not necessary." *Arizona v. Washington*, 434 U.S. at 511.

The Court of Appeals' opinion would establish new precedent in derogation of *Arizona* and the Fifth and Eleventh Circuits that requires a court reviewing a state

judge's discretionary decision to substitute its own judgment on what it would have done for that of the state trial judge. *Arizona* does not authorize such an analysis – in fact, it forbids it due to the respect for the state trial judge.

If there was any doubt about the breadth of the new approach by the Court of Appeals, the opinion reveals that it painstakingly viewed 26 photographs of the crime scene, compared and contrasted them with each other, and determined the fact that the unadmitted photographs which were seen were not unduly prejudicial. 75 F.3d at 887-888, 898, 902. This analysis was done despite the fact that the state trial judge, who knew the jury and evidence, found contrary and defense counsel have expressly and repeatedly conceded the photographs prejudiced the state, could have led to jury confusion, and benefitted the defense theory at trial. J.A. pp. 326-334.

This analysis was clearly in violation of *Arizona* and demands reversal. Accord *U.S. v. Sanford*, 536 F.2d 871 (9th Cir.), *rev'd per curiam*, 429 U.S. 14 (1976). Here, the state trial judge articulated in writing his reasons for declaring the mistrial in the order denying the motion to dismiss. J.A. at pp. 35-41. Therein, the state trial judge expressed his grave concern about the prejudicial occurrence of the jury having viewed unadmitted photographs. The trial court found that it "could not foresee if the questioned photographs would have been offered and if offered, admitted into evidence." J.A. p. 39. The trial court reminded the parties that it had brought the problem to the attention of the litigants as to how to proceed and allowed counsel to explain their positions. The court restated the steps it took to determine whether the jury had reviewed the photographs, including inquiry of the jury foreman and considered and rejected a curative instruction. The court concluded that the instruction would only "highlight and compound the error already

existent." J.A. pp. 38-40. The trial court further determined that "necessity" existed. Further, the judge found that to have granted the motion to dismiss would "reward" the defense for their own action.

Contrary to the opinion of the Court of Appeals, the state trial judge did not see his role to determine how unadmitted evidence could or should be admitted, but rather to determine the effect of the *error* on a jury receiving unadmitted evidence that has an effect on the integrity of the trial. His deliberate consideration at the time of the mistrial was a matter of "sound discretion."

Further, it is clear that the unadmitted photographs prejudiced the prosecution because they uniquely revealed evidence the defense now claims was important to them – the presence or absence of blood and further showed tire tracks believed to have been made by Gilliam's truck to show whether they were on or off the decedent's property. These were factors now claimed to be central to the defense.

The jury was improperly given material that was prejudicial and gave rise to a jury bias that did not exist without the presentation of the matters to the jury. Under *Arizona*, the showing of probability of juror prejudice satisfactorily supports the state trial court's discretionary action. The issue was not one of future admissibility, it was to determine whether there was an abuse of discretion by the mistrial after the jury had seen the tainted photographs. *Arizona* does not require the admission of the photographs.

In his dissent, Judge Luttig squarely contrasts *Arizona* with the instant case. 75 F.3d at 924-926. App. 104-111. As his summary confirms, the reasons for reversing the *en banc* opinion and affirming the state trial judge are more compelling here than they were in *Arizona*. The state trial judge was faced with a problem created by neglect of the defense without prosecution misconduct. The unadmitted photographs may have affected the jury's impartiality.

The state judge gave the defense a full opportunity to explain their situation, and rejected the possibility of a curative instruction. The trial court, unlike *Arizona*, articulated his reasons for declaring a mistrial and asserted that he found manifest necessity. Further, the state judge determined the occurrence was "prejudicial" and the defense admits the photographs prejudiced the state's case.

The federal courts should never compare and contrast the crime scene photographs wrongfully placed by the defense before the jury *de novo* to determine whether they might have been admitted in the future and whether, after months of study, they might have prejudiced the jury. The analysis ignores the reality of the trial and the deference due the state trial judge who, with grave concern, was required to make that determination at the trial. Here, the trial court allowed the defense and state to argue their positions and recommend cures. The fact that courts may differ on the action does not mean that his "sound discretion" was in error. The state judge acted responsibly and deliberately. The Fifth Amendment does not require more.

CONCLUSION

For all the foregoing reasons, the Petitioners request that certiorari and the opinion of the Court of Appeals be reversed.

Respectfully submitted,

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March 21, 1996

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DARRELL WAYLAND GILLIAM, JR.; PAMELA OWINGS; JAMES MATTHEW SWAIN, *Petitioners-Appellees,* v. AMES LEE FOSTER, Sheriff of Newberry County, CHARLES M. CONDON, Attorney General for the State of South Carolina; JAMES W. JOHNSON, JR., Circuit Court Judge of South Carolina, *Respondents-Appellants.*	)	No. 95-2434

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., District Judge.
(CA-95-1742-17AJ, CA-95-1743-17AJ, CA-95-1744-17AJ)

Argued: September 26, 1995

Decided: January 29, 1996

efore ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

ffirmed by published opinion. Judge Wilkins wrote the ajority opinion in which Chief Judge Ervin and Judges all, Murnaghan, Hamilton, Williams, Michael, and Motz ined; Judge Wilkinson wrote a dissenting opinion in hich Judges Russell, Widener, Niemeyer, and Luttig

joined; Judge Niemeyer wrote a dissenting opinion in which Judge Widener joined; and Judge Luttig wrote a dissenting opinion in which Judges Russell, Widener, Wilkinson, and Niemeyer joined.

COUNSEL

ARGUED: Donald John Zelenka, Assistant Deputy Attorney General, Columbia, South Carolina, for Appellants. Joy Scherffius Goodwin, LEVY & GOODWIN, Columbia, South Carolina, for Appellees. **ON BRIEF:** J. Christopher Mills, FAIREY, PARISE & MILLS, Columbia, South Carolina, for Appellee Gilliam; Samuel M. Price, Jr., Newberry, South Carolina, for Appellee Owings.

OPINION

WILKINS, Circuit Judge:

Petitioners Darrell Wayland Gilliam, Jr., Pamela Owings, and James Matthew Swain brought this action pursuant to 28 U.S.C.A. § 2254 (West 1994). They maintain that because a state trial judge granted a mistrial over their objection and in the absence of manifest necessity during their first trial, subjecting them to a second criminal prosecution would violate their rights under the Double Jeopardy Clause of the United States Constitution.

The principal issue presented is whether the state trial judge exercised sound discretion in granting the prosecution's motion for a mistrial because the jury

viewed certain photographs prior to their formal admission into evidence. These photographs had been authenticated properly, were relevant, were material, and were otherwise unobjectionable. Further, the witness who had authenticated the photographs was available to retake the witness stand to permit their formal introduction.

The district court granted the writ of habeas corpus.[1] The State[2] appeals, claiming that the second prosecution would not violate Petitioners' double jeopardy rights, and that in any event the district court should have abstained from granting habeas corpus relief under *Younger v. Harris*, 401 U.S. 37 (1971). For the reasons set forth more fully below, the judgment of the district court is affirmed.

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[1] Although the district court ordered that the writ issue, by separate order dated July 24, 1995, it refused to permit the release pending appeal of Gilliam – who, although initially released on bond, was later taken into physical custody for a violation of that bond – or the removal of the restrictions placed on Swain and Owings – both of whom had been released on bond pending trial in state court. *See* Fed. R. App. P. 23(c) (authorizing district court to continue custody in its discretion pending appeal). Petitioners have not sought review of this order of the district court.

[2] We refer to Respondents – James Lee Foster, Sheriff of Newberry County, South Carolina; Charles M. Condon, Attorney General for the State of South Carolina; and James W. Johnson, Jr., Circuit Court Judge of South Carolina – as "the State."

I. *FACTS*

Although the facts underlying this appeal have been fully set forth in the decision of the district court, we include them here in some detail in order to facilitate a better understanding of our decision.

A. *Background*

The incidents giving rise to the criminal charges against Petitioners began on the afternoon of January 5, 1993, when Hope Icard physically attacked Christie Gilliam, Petitioner Gilliam's sister. A short time later that afternoon, this altercation led to a confrontation between family members of the two women at the residence of Icard's sister and brother-in-law, the Silvers. Petitioners arrived outside the Silvers' mobile home in Petitioner Gilliam's truck. Although the subsequent events are subject to some dispute, it is uncontested that gunshots were ultimately exchanged. From inside the mobile home, Ernest Silvers and his stepson discharged firearms. Petitioner Gilliam, who was outside the mobile home, was injured by this gunfire in the lower leg. Petitioner Swain was charged with murdering Ernest Silvers by shooting him in the chest with a rifle as Silvers stood in the front doorway of the mobile home. Petitioners Gilliam and Owings, who were unarmed, were charged with aiding and abetting Swain. In addition, Petitioners were charged with lynching in connection with Silvers' death;[3]

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[3] South Carolina law defines lynching as an act of violence inflicted by a mob – an "assemblage of two or more persons . . . for the premeditated purpose and with the premeditated

Petitioner Swain was charged with assault with the intent to kill; and Petitioner Gilliam was charged with indecent exposure. This latter charge against Gilliam alleged that he had exposed himself to the occupants of the Silvers' mobile home while taunting them prior to the exchange of gunfire.

B. *Initial State Trial Proceedings*

Petitioners' trial began in state court in late 1994. On the third day of trial, the prosecution presented the testimony of Officer Counts, a former special agent with the South Carolina Law Enforcement Division (SLED). Officer Counts had been present at the scene soon after the altercation and could testify about the investigation and identify photographs of the scene.

On cross-examination, defense counsel asked Officer Counts whether he had found blood outside the Silvers' mobile home. Officer Counts stated that he would like to look at the photographs of the scene to refresh his memory. The photographs to which Officer Counts referred were ones that had been taken either by Officer Counts or in his presence by another SLED agent; copies of these photographs had been provided to the defense prior to trial. Defense counsel showed a group of seven photographs (Set 1) to one of the prosecuting attorneys and then handed them to Officer Counts. The prosecuting attorney – believing that the photographs were being

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intent of committing an act of violence upon the person of another" – that results in death. S.C. Code Ann. §§ 16-3-210, 16-3-230 (Law. Co-op. 1985).

offered into evidence – said, "Without objection." The trial judge then inquired whether defense counsel was offering the photographs into evidence at that time, and defense counsel responded that he was using them only to refresh the officer's recollection. The prosecuting attorney noted that he had spoken prematurely.[4]

After Officer Counts reviewed the photographs in Set 1, and defense counsel established that Officer Counts was familiar with the photographs because he was there when they were taken or actually had taken them, defense counsel inquired:

> Q. Looking at those photographs were you able to refresh your recollection as to whether or not any blood was found on the scene?

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[4] The pertinent colloquy when defense counsel began to show Officer Counts the photographs of the scene outside the mobile home to refresh his recollection was:

> PROSECUTING ATTORNEY: Do you mind if I see those?
>
> (Photographs were handed to the prosecuting attorney.)
>
> PROSECUTING ATTORNEY: Just one minute.
>
> (Pause)
>
> PROSECUTING ATTORNEY: Without objection.
>
> THE COURT: Were those being offered at this time?
>
> DEFENSE ATTORNEY: No, sir. We were just using these to refresh Mr. Counts' recollection.
>
> PROSECUTING ATTORNEY: I'm sorry. That was premature.

J.A. 60-61.

A. Yes, sir. There was a red substance. I am not a serologist, but there was a red substance that appeared to be blood found at the scene.

Q. And when blood is found on the scene, how [is it] typically marked in terms of when you find blood outside a trailer and it indicates blood, is it marked as part of your investigation? Do you mark the ground in some way to indicate that you found something?

A. Yes, sir. We would circle the area, surround it with crime scene tape, we would [put] a cone out or anything to keep somebody from walking and disturbing that.

Q. Based on those photographs that you had used to refresh your recollection, do you see such a photograph that would indicate that sighting of blood that was marked?

A. Yes, sir. I could.

Q. And if you could, hand us that. If you could, flip through and find the photograph or photographs that would indicate that.

A. *Basically all of these [are] the same area where the blood was found. Just overall views of it.*

Q. I hand you what has been marked as Defendant's exhibits 16, 8, 13, 12 and 14 [Photo Set 2]. Would it be your testimony that those [photographs] mark the finding of blood *but just from different angles?*

A. *Yes, sir.* I can't tell you that that substance is in fact blood. I am not a serologist, but I can tell you that these were photographs that myself or Agent Gainey of SLED took, and the substance resembles blood, and these five photographs

> depict the same area adjacent to the trailer where we found [the] substance that resembled blood.

J.A. 61-62 (emphasis added). At this point in the examination, defense counsel asked Officer Counts to approach a diagram of the scene prepared by the prosecution and, using the photographs, to mark on an overlay the location where what appeared to be blood was found. Officer Counts then marked the three places where red spots were observed, testifying, "This is basically where the blood was found, in this vicinity here to the left of the trailer, almost to the roadway." J.A. 63. In response to defense counsel's follow-up questions concerning the distance from the area where blood was found to the mobile home and the roadway, Officer Counts referred to the notes made by the serologist on the scene and testified that "there were three areas of blood in this location," that the distance between "these portions of blood here" was seven feet, and that the corner of the mobile home was 70 feet from the road with the blood depicted in the photographs being "right off the roadway in this area." J.A. 64.

During the remaining cross-examination of Officer Counts, two of the three groups of SLED photographs of the scene (Sets 2 and 3) were introduced into evidence by the defense without objection. The photographs referred to as Set 2 included Exhibits 8, 12, 13, 14, and 16. The

photographs referred to as Set 1 – Exhibits 9, 10, 11, 15, 17, 18, and 19 – were not offered into evidence.[5]

A description of these photographs and a comparison of the photographs included in Set 1 vis-a-vis those in Set 2 is instructive. The photographs in Set 2, with the exception of Exhibit 16, are identical in every material aspect and show the area outside the Silvers' mobile home. Each of these photographs was taken from near Highway 32, the public roadway in front of the Silvers' mobile home, from the left-hand side of the mobile home and looking down the driveway toward it. The mobile home and the adjacent yard and driveway are shown in the background of these photographs, and all of them show the same three pieces of yellow tape in the foreground – the closest two pieces are circular in shape, one to the left and one to the right, and one strand of yellow tape is behind the two circular pieces and a few feet closer to the mobile home. The remaining photograph in Set 2, Exhibit 16, shows the same location, but reveals only the circular piece of tape to the right and one-half of the circular piece to the left.

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[5] When defense counsel offered the Set 2 photographs into evidence, the following colloquy occurred:

> DEFENSE ATTORNEY: Mr. Counts, you have previously identified these photographs?
>
> OFFICER COUNTS: Yes, ma'am.
>
> DEFENSE ATTORNEY: Your Honor, I would move to introduce them into evidence. I believe they are numbers 16, 8, 13, 12 and 14.
>
> PROSECUTING ATTORNEY: Without objection.
>
> THE COURT: Without objection.

J.A. 77.

As noted above, these five photographs were admitted into evidence without objection from the prosecution and with no specific testimony by Officer Counts concerning the location depicted or the relevance of the scene they depicted.

Of the seven photographs in Set 1, four of them, Exhibits 10, 17, 18, and 19, are close-ups of the three pieces of yellow tape: Exhibit 10 shows a close-up of the circular piece of tape on the left of the photographs in Set 2; Exhibit 17 is a close-up of the two circular pieces of tape shown in the photographs in Set 2; Exhibit 18 is a close-up of the strand of tape behind the two circles of yellow tape in the photographs in Set 2; and Exhibit 19 is a photograph of the circle of tape on the right in the photographs in Set 2. These photographs show red spots within or near the areas marked with the yellow tape more clearly than the photographs in Set 2. Exhibit 15 is virtually identical to those in Set 2, taken from the same camera angle and depicting all three pieces of yellow tape. The two remaining photographs in Set 1, Exhibits 9 and 11, reveal the same three pieces of tape, but were taken from approximately the opposite location from those in Set 2; in other words, they are taken from near the mobile home facing up the driveway and toward Highway 32. These latter two photographs depict more clearly the same tire tracks shown in the photographs in Set 2.

Following Officer Counts' testimony, the state trial judge recessed for lunch with instructions that all of the photographs and other evidence that had been published remain in the courtroom. During the lunch break, the court reporter discovered that the photographs in Set 1 –

which had not been admitted into evidence – had been placed on the jury rail in a stack along with the photographs in Sets 2 and 3 – which had been properly introduced into evidence. Concerned that the jury may have viewed evidence that had not been properly admitted, the trial judge conducted a bench conference during which he brought this to the attention of counsel and then provided the parties with an opportunity to evaluate the situation.

When the trial proceedings resumed, the prosecution moved for a mistrial, blaming defense counsel for the error and stressing that the defense had "placed something that is easily accessible, has been accessible by the jury, which is not in evidence . . . and that is improper." J.A. 87. The defense strenuously objected. It disagreed with the prosecuting attorney's suggestion that defense counsel had been responsible for placing the unadmitted photographs in Set 1 where the jury could view them. Defense counsel argued that a mistrial was completely unnecessary and offered to "recall [Officer Counts] and move [the photographs] into evidence," explaining that Officer Counts had already identified the photographs and had testified about them. J.A. 88-89. Further, defense counsel emphasized that even if the jury actually saw the photographs, there was no prejudice to the prosecution because all of the Set 1 photographs depicted the same scene as other photographs that had already been admitted into evidence.

The state trial judge called the foreman of the jury into the courtroom and asked him whether the jury had looked at all of the photographs that had been in the stack on the jury rail before lunch. Although the foreman

was not given an opportunity to examine each photograph individually, he responded that as far as he knew all the photographs had been viewed by the jury. The defense requested that the trial judge ask additional questions to ascertain whether the jury had in fact seen the unadmitted photographs, noting that it was entirely possible that the photographs had been placed in the stack on the railing during the lunch break since defense counsel recalled that the photographs had been left in the witness box when the court recessed. The state trial judge, however, refused to do so and declared a mistrial over defense counsel's objection. The state trial judge stated that he had no choice but to grant a mistrial because the photographs had not been admitted, were not identified, had not been testified to, and had been circulated to the jury. He further indicated that he had no way of knowing whether the photographs would later be offered and admitted into evidence.

Defense counsel requested that the state trial judge ask the court reporter to read back Officer Counts' testimony because he, in fact, had identified the photographs and testified using them. Again, however, the state trial judge summarily declined to do so, noting that if he was incorrect the record would bear that out. At no point did the state trial judge indicate that double jeopardy concerns were implicated by the grant of a mistrial. And, neither the prosecution nor the state trial judge indicated that the photographs were in any way prejudicial to the prosecution or the defense.[6]

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[6] The state trial judge did not make a finding of manifest necessity or a finding of prejudice. Indeed, he did not use the

C. *Post-trial State Proceedings*

In March 1995, prior to the second trial, Petitioners filed a motion before the state trial judge requesting dismissal of the charges against them on double jeopardy grounds, arguing that manifest necessity had not existed to justify the grant of the mistrial over their objections. The state trial judge denied the request. Although the state trial judge did not make a finding that the jury's having seen the photographs was prejudicial and did not offer any possible explanation of how the jury's viewing the unobjectionable photographs actually might have improperly biased or influenced the jury for or against either the prosecution or the defense, the state trial judge did refer to the incident at one point as a "prejudicial occurrence," J.A. 38, and opine that he was "concerned about the origin of the prejudice," J.A. 39. He explained only that the mistrial had been necessary because he could not have foreseen whether the photographs would have been offered into evidence and, if so, whether they would have been admitted. The state trial judge did not address the fact that the prosecuting attorney had offered no objection to the admission of the photographs when he believed that they were being offered into evidence or that the defense had offered to recall Officer Counts and formally move their introduction.

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word "prejudice" during this proceeding. Further, the state trial judge gave no hint of what prejudice might possibly exist such that a reviewing court could conclude that prejudice resulted from the jury's viewing the photographs in Set 1.

Petitioners appealed this ruling to the South Carolina Supreme Court. That court, however, dismissed the appeal as interlocutory under South Carolina law.

D. *Federal Habeas Proceedings – District Court*

Petitioners then filed this action in district court pursuant to 28 U.S.C.A. § 2254 (West 1994),[7] claiming that the upcoming second trial violated their right not to be twice put in jeopardy for the same offense because no manifest necessity existed to support the grant of the mistrial in the first trial. The State responded that the mistrial was necessary to "alleviate prejudice" caused by the jury's consideration of unadmitted evidence; however, the State did not identify or in any way suggest what possible prejudice may have resulted. On June 29, 1995, Petitioners sought either a temporary injunction of the scheduled state criminal trial or expedited consideration of their habeas petition.

On July 7, 1995, a United States Magistrate Judge issued a report and recommendation concluding that a temporary stay of the scheduled state court proceedings

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[7] There is no question concerning the propriety of a federal court considering the habeas petition. Petitioners are in custody, either in actual custody or subject to bond restrictions, and have exhausted their state remedies. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-03 (1984). A federal habeas court is the only forum in which Petitioners may attempt to protect their double jeopardy right not to be tried twice for the same offense. *See id.* And, it should be noted that there is no suggestion that Petitioners have not proceeded in as timely a manner as possible in bringing this issue to a prompt resolution.

was appropriate because: Petitioners would suffer irreparable harm if the temporary relief was not granted; the balance of harms tipped decidedly in favor of Petitioners; Petitioners had demonstrated serious and substantial questions that were fair ground for litigation on the merits of their double jeopardy claim; and the public interest favored the grant of temporary injunctive relief.

On July 10, 1995, the district court conducted an expedited, non-evidentiary hearing of the motion for a temporary restraining order and adopted the majority of these recommended findings of the magistrate judge. The district court, however, determined that Petitioners had shown no likelihood of succeeding on their double jeopardy claim and therefore were not entitled to injunctive relief. The court reasoned that because questions of provocation and self-defense were being raised, the location of the parties when the gunshots were fired – *i.e.*, whether on a public roadway or the Silvers' property – was relevant and that several of the photographs in Set 1, being close-ups of the ground showing what appeared to be blood, could be used to more clearly document their locations. This conclusion was based only on purely speculative statements of the State's attorney, not on any evidence in the record. Significantly, although the district court concluded that the photographs could be used to demonstrate more clearly where the shooting had occurred, it did not find that the photographs were unduly prejudicial, as opposed to simply relevant.[8]

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[8] The district court also accepted an argument raised by the State for the first time during oral argument on the motion. The State asserted that defense counsel may have been attempting to place this evidence before the jury improperly to allow them to

E. *Federal Habeas Proceedings – Circuit Court – Stay Request*

After the district court denied their request for a temporary stay of the scheduled state criminal

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make the last closing argument to the jury. Under a South Carolina procedural rule, the defense may make the last argument if it does not present evidence. The State argued that although the defense had introduced 28 exhibits into evidence during the prosecution's case in chief, some state court judges might nevertheless have permitted the defense to have the last argument if it had not introduced evidence in its own case.

This argument is baseless. First, it is well-settled law in South Carolina that if the defense introduces any evidence, whether in its own case or in the State's case, it loses the right to have the last argument. *State v. Gellis*, 155 S.E. 849, 855 (S.C. 1930); *State v. Battle*, 403 S.E.2d 331, 333 (S.C. Ct. App. 1991). And, it is undisputed that the defense previously had offered into evidence a series of exhibits that had been admitted without objection and therefore had already lost its right to make the last argument before the incident with the unadmitted photographs occurred. Second, and more fundamentally, the State's argument is logically flawed. If, as the State maintained, the defense had been motivated by a desire to place this evidence before the jury without losing its right to make the final argument, and, further, if some confusion among state trial judges concerning the law may have permitted the defense to retain the right to make the last argument even though evidence was introduced by the defense during the prosecution's case, obviously the defense would have simply moved the introduction of the photographs in Set 1 during Officer Counts' testimony. Alternatively, if there was no dispute concerning whether the introduction of other evidence by the defense during the prosecution's case waived the right to final argument, then defense counsel would have already known it was waived. In either circumstance, there would have been no point in attempting to place the evidence before the jury without having it admitted first. The State has now abandoned this position.

proceedings or expedited consideration of their habeas petition, Petitioners submitted to a panel of this court a request for emergency relief from the order of the district court. *See* Fed. R. App. P. 8. The panel heard oral arguments on Saturday, July 15, 1995. Questions during argument demonstrated that the panel was particularly concerned with whether the State had identified any prejudice to the prosecution or Petitioners resulting from the jury's having viewed the photographs in Set 1 without their formal admission into evidence. As the following colloquy reveals, the State's attorney conceded that the photographs in Set 1 were relevant, were not unduly prejudicial, and were, in fact, admissible:

> THE COURT: All right. Is there any question in your mind, Mr. Zelenka, as an experienced attorney that, had the Defense said, "Your Honor, we move [the Set 1 photographs] into evidence," and the State had said, "No objection," that they would have been marked as an exhibit?
>
> STATE'S ATTORNEY: At the time of that trial I do not see any reason why they would not have been introduced as an exhibit. That's right.
>
> THE COURT: Today – today, Mr. Zelenka, can you give this Court any reason why these photographs shown as [Set 1] are not relevant evidence and properly admissible either by the State or by the Defense?
>
> STATE'S ATTORNEY: This evidence could have been admitted at the time of that particular trial.
>
> THE COURT: That's not my question. . . . *Is there any reason why these photographs in [Set 1]*

are not relevant evidence and properly admissible either offered by the State or by the Defense?

STATE'S ATTORNEY: *No, sir.*

THE COURT: All right, sir. . . . So, this is relevant evidence. There's no reason it should not have been before the jury, other than the fact [that] the Defendant didn't say, "We move into evidence"?

STATE'S ATTORNEY: That's correct.

. . . .

THE COURT: *Was there any reason other than the technical reason [that the defense failed to move the photographs into evidence], that these photographs should not have properly been shown to the jury, as [Set 2 and Set 3] were during the course of the trial?*

STATE'S ATTORNEY: *In my analysis of these photographs, these are not the type of photographs that the state court system would have excluded from evidence based upon a prejudicial factor.*

THE COURT: So you offer no reason why it would have been improper for these photographs to have been admitted into evidence and shown to the jury?

STATE'S ATTORNEY: *No reason at all once Mr. Counts authenticates the documentation.*

Transcript of July 15, 1995 Arguments at 28-31 (emphasis added). The State also conceded that there was no rule of law or procedure that prevented Officer Counts from being recalled to the stand so that the defense could move the admission of the photographs. In further questioning from the panel, the State opined that the photographs in Set 1 showed more clearly what appeared to be blood in

or near the areas marked with yellow tape. Following a conference at the conclusion of the hearing, the panel, by a vote of two to one, denied the requested relief.

On Monday, July 17, 1995, Petitioners sought en banc review of the order denying temporary relief. And, on July 20, 1995, a majority of the active circuit judges voted in favor of granting temporary relief from the order of the district court. We remanded to the district court with instructions to rule on the merits of the habeas petition as expeditiously as possible. *Gilliam v. Foster,* 61 F.3d 1070 (4th Cir.1995) (en banc).

F. *State Criminal Proceedings – Second Trial*

While the poll of the en banc court was proceeding, Petitioners' retrial began in state court on July 17. Prior to the second trial, the state judge who presided over the first trial and who is a named respondent in this litigation, sua sponte recused himself before the retrial began. During the course of the retrial, the photographs in Set 1 were offered into evidence by the defense. The prosecuting attorney objected to their admission on the ground that the photographs were cumulative and confusing.[9]

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[9] In my opinion for the en banc court granting Petitioners' request for a temporary stay of the state criminal proceedings, I noted that Petitioners had represented to us that during the second trial, the photographs were admitted without objection by the State and that subsequently the State objected to their admission. As the testimony before the district court made clear, this was not correct: Although defense counsel recalled that in a discussion with opposing counsel off the record, the State had indicated that it would not have any objection to a number of

The presiding state trial judge overruled the objection and admitted the photographs into evidence. On Thursday, July 20, upon learning that this court had stayed the state criminal proceedings, the state trial judge suspended the trial pending further notice.

G. *Federal Habeas – District Court on Remand*

On July 21, immediately following our remand, the district court conducted a lengthy and thorough evidentiary hearing. Subsequently, it entered comprehensive findings of fact based upon the evidence and testimony presented and held that the retrial of Petitioners was, indeed, barred by the Double Jeopardy Clause.

The district court rejected the State's claim that manifest necessity for the mistrial existed because the jury's viewing the Set 1 photographs was unduly prejudicial, finding as a factual matter that the photographs in Set 1 had been "authenticated by Officer Counts, were used by him to refresh his recollection as to whether there were blood stains on the ground, and were actually relied upon by him in fashioning a demonstrative exhibit showing the location of what appeared to him to be blood stains, tire tracks, and other evidentiary items." The court also found that because Officer Counts had already testified concerning the relative locations of the objects depicted in the Set 1 photographs, the disputed photographs were of

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photographs, including those that composed Set 1, the State did object to the introduction of the photographs prior to their admission. In any event, whether the State objected to the photographs during the second trial is irrelevant.

"no real significance to either party" viewed in the context of the trial.

Further, the district court rejected the State's argument that the photographs would likely cause juror confusion because the location of the areas marked with yellow tape depicted in the photographs had not been explained sufficiently by Officer Counts and because the "red spots" that were more visible in the Set 1 photographs might lead the jury to conclude that the photographs showed Gilliam's blood. The court determined as a factual matter that during his testimony Officer Counts adequately identified the location of the three areas marked with yellow tape. In addition, the court concluded that the photographs did not present an undue risk of juror confusion concerning whether the "red spots" were blood because Officer Counts, the State's witness, and the investigating officer, had already testified that these areas were marked with yellow tape based on the investigators having discovered what appeared to be blood there, and the fact that a serologist had not tested the red spots would not have provided a basis for exclusion of the photographs,[10] nor was it necessary to lay a proper foundation for introduction of the photographs.

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[10] One of the prosecuting attorneys testified before the district court that so far as she knew no serological test had been conducted on the swabs of blood taken from the scene. Prior to oral argument before the en banc court, the parties informed us that, in fact, serological testing had been performed and that the results indicated that the spots were human blood.

Additionally, the district court held that even assuming the photographs in Set 1 were somehow prejudicial, manifest necessity did not support the grant of the mistrial by the state trial judge because obvious and adequate alternatives to the mistrial were available. For example, allowing Officer Counts to be recalled to the witness stand would have resolved any possible problem.

Finally, the district court concluded that the state trial judge acted improvidently and precipitately in granting the mistrial. The district court based this conclusion on the facts that the state trial judge had failed to evince any concern for the possible double jeopardy ramifications of his actions, had failed to permit the parties an opportunity to fully explain their positions, and had declined to permit further inquiry into whether the photographs had been authenticated during Officer Counts' testimony.

Accordingly, the district court granted the writ of habeas corpus. By separate order, however, it declined to enlarge the Petitioners pending appeal.[11]

From the order of the district court granting the writ of habeas corpus, the State appeals.[12] A majority of the

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[11] It appears that upon notification that the district court had granted the writ of habeas corpus, the state trial judge released the jurors, but did not dismiss them or grant a mistrial.

[12] Following the decision of the district court granting the writ, the State sought relief from the order of the district court before this court in order to permit the resumption of Petitioners' criminal trial during the pendency of this appeal. This relief was denied. *Gilliam v. Foster*, 63 F.3d 287 (4th Cir. 1995) (en banc). The State also requested that this court prevent the enlargement of Petitioners; however, the district court had

members of the en banc court voted to grant en banc hearing of the State's appeal on an expedited basis.

II. *DOUBLE JEOPARDY*

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Among the protections provided by this Clause is the assurance that a criminal defendant will not be subjected to "repeated prosecutions for the same offense." *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). This protection encompasses a right to have a particular tribunal decide guilt or innocence once jeopardy has attached.[13] *Id.* at 672-73.

> The reasons why this "valued right" merits constitutional protection are worthy of repetition.

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already stayed Petitioners' enlargement pending appeal, and Petitioners had not appealed from this ruling, so no relief from this court was necessary to ensure that Petitioners remained subject to the same custodial arrangements to which they had been subjected during the state criminal proceedings. After this court ruled, the State moved Chief Justice Rehnquist, sitting as the Circuit Justice for the Fourth Circuit, to grant temporary relief from the order of the district court pending appeal. Chief Justice Rehnquist refused to permit the State to proceed with the criminal prosecution pending appeal, but granted the State's application for a stay of enlargement. *Foster v. Gilliam*, 116 S. Ct. 1 (Rehnquist, Circuit Justice 1995).

[13] It is well settled that jeopardy attaches in a jury trial when the jury is empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 35 (1978).

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.

Arizona v. Washington, 434 U.S. 497, 503-04 (1978) (footnotes omitted). For these reasons, a prosecutor generally is permitted only one opportunity to compel a defendant to stand trial. *Id.* at 505.[14]

Nevertheless, if a criminal proceeding is terminated by mistrial without a final resolution of guilt or innocence, a defendant may be retried in certain circumstances.[15] *Id.* When a defendant seeks or consents to the grant of a mistrial, there is no bar to his later retrial.[16]

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[14] Because the Supreme Court has made plain that the Double Jeopardy Clause affords protection against retrial even when the first trial has not been completed, we are not free to adopt the position advanced by one of the dissenting members of this court that the Double Jeopardy Clause furnishes protection only when the first trial has been completed or the prosecution has acted in bad faith. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

[15] Of course, if a criminal prosecution has "ended in an acquittal or conviction," the government is absolutely barred from prosecuting him further for the same offense. *See Arizona v. Washington*, 434 U.S. at 505.

[16] This proposition is subject to an exception when the defendant establishes that his request for the mistrial was motivated by prosecutorial or judicial misconduct that was

Kennedy, 456 U.S. at 672-73. But, when a defendant opposes the grant of a mistrial, he may not be retried unless there was a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice. *United States v. Dinitz*, 424 U.S. 600, 606-07 (1976); *Wade v. Hunter*, 336 U.S. 684, 690 (1949). This proposition of law was first recognized in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824), where Mr. Justice Story wrote:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

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intended to provoke the defendant into moving for a mistrial. *Kennedy*, 456 U.S. at 673-79.

Based on this explication in *Perez*, the Supreme Court has consistently stressed the great deference to be accorded to the decision of the trial judge to grant a mistrial. *See, e.g., Illinois v. Somerville*, 410 U.S. 458, 461-66 (1973). A reviewing court must "accord the highest degree of respect to the trial judge's evaluation of the likelihood" that the circumstances giving rise to the mistrial would have affected the impartiality of the deliberations of the jury. *Arizona v. Washington*, 434 U.S. at 511. Indeed, when some event creates the possibility that the jury may have been biased, the decision of the trial judge who has had the opportunity to observe the sequence of events in the context of the trial is entitled to special respect.[17] *Id.* at 512-14. The trial judge need not make an explicit finding of manifest necessity or articulate the factors that led to the exercise of his discretion, and his decision is not subject to attack on this basis when the record adequately discloses the basis for his ruling. *Id.* at 516-17.

The deference owed to the decision of the trial judge to grant a mistrial, although great, is not unlimited. *Id.* at 514 ("Our conclusion that a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference does not, of course, end the inquiry."). The

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[17] This level of deference falls on a spectrum between the strictest appellate scrutiny that applies when a trial judge grants a mistrial in order to permit the prosecution an opportunity to garner more evidence against the accused and the highest level of appellate deference that applies when a trial judge dismisses a hopelessly deadlocked jury. *Arizona v. Washington*, 434 U.S. at 507-10.

Supreme Court has made absolutely clear that "[i]n order to ensure that [the defendant's constitutionally protected interest in having a particular empaneled jury decide his guilt] is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.* at 514. If the grant of a mistrial by the trial judge amounts to an irrational or irresponsible act, he must be found to have abused his discretion in finding that manifest necessity for the mistrial existed, for a trial judge " 'must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.' " *Id.* (quoting *United States v. Jorn*, 400 U.S. 470, 486 (1971) (Harlan, J.) (plurality opinion)).

Although the Supreme Court has never explicitly articulated a test for a reviewing court to apply in analyzing whether the exercise of discretion by the trial judge in granting a mistrial was sound as opposed to irrational or irresponsible, we are able to distill some factors that are relevant to this inquiry by looking to the considerations that have framed that Court's analysis of this issue. First, a reviewing court should look to whether a trial judge rationally could conclude that the grant of the mistrial was compelled by manifest necessity or whether the ends of public justice demanded that one be granted on the peculiar facts presented. *See Arizona v. Washington*, 434 U.S. at 514-16 (noting that the trial judge had been presented with a situation in which the jury had been exposed to inadmissible and highly prejudicial material,

creating manifest necessity to support the mistrial); *Somerville*, 410 U.S. at 468-71 (holding ends of public justice supported the grant of a mistrial in first proceeding when "defect was found to exist in the indictment that was, as a matter of Illinois law, not curable by amendment," rendering any conviction obtained subject to being "upset at will" on appeal or in collateral proceedings); *Downum v. United States*, 372 U.S. 734, 735-38 (1963) (examining facts to determine whether grant of mistrial supported by manifest necessity when based on absence of prosecution witness); *Wade*, 336 U.S. at 691-92 (concluding that record was sufficient to show that rapidly advancing army brought about tactical situation responsible for the withdrawal of charges from first court-martial and thus was supported by manifest necessity). In addition, a reviewing court may find relevant whether the trial judge acted precipitately or whether the trial judge expressed concern regarding the possible double jeopardy consequences of an erroneous declaration of a mistrial, heard extensive argument on the appropriateness of such a measure, and gave appropriate consideration to alternatives less drastic than granting a mistrial. *See Arizona v. Washington*, 434 U.S. at 514-16; *see also Jorn*, 400 U.S. at 486-87 (plurality opinion) (concluding that based on circumstances surrounding sua sponte grant of mistrial, trial judge made no effort to exercise sound discretion). We turn to address the application of these factors.

A. *Did Manifest Necessity or the Ends of Public Justice Support the Grant of a Mistrial?*

Whether a grant of a mistrial is manifestly necessary is a question that turns on the facts presented to the trial

court. *Somerville*, 410 U.S. at 464; *Wade*, 336 U.S. at 690-91. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge. *Arizona v. Washington*, 434 U.S. at 506; *see Somerville*, 410 U.S. at 467 (rejecting application of rigid rules in which categories of errors support or fail to support manifest necessity for the grant of a mistrial). And, while manifest necessity for a mistrial does not require that a mistrial be "necessary" in the strictest sense of the word, it does require a high degree of necessity. *Arizona v. Washington*, 434 U.S. at 506. Perhaps the clearest example of a situation in which manifest necessity exists for a mistrial is when a jury is unable to reach a verdict. *Id.* at 509. At the other extreme are situations in which a prosecuting attorney seeks a mistrial in order to have additional time to marshal evidence to strengthen the case against the defendant. *Id.* at 508. Between these two extremes exists a spectrum of trial errors and other difficulties, some creating manifest necessity for a mistrial and others falling far short of justifying a mistrial. *See id.* at 510.

The State concedes, as it has previously to this court, that the photographs in Set 1 were relevant evidence and that assuming they had been offered into evidence after a proper foundation had been laid for their admission, the photographs would have been admitted into evidence. As pictures of the scene where the altercation occurred, the photographs in Set 1 were relevant evidence. *See State v. Gilbert*, 283 S.E.2d 179, 181 (S.C. 1981) (holding crime scene photographs properly admissible to show circumstances of the crime), *cert. denied*, 456 U.S. 984 (1982); *State v. Wells*, 426 S.E.2d 814, 818 (S.C. Ct. App. 1992) (noting

that photographs of crime scene are admissible to corroborate other evidence). And, as the State also previously conceded, there is no basis for concluding that these photographs were subject to exclusion on the basis that they "are unfairly prejudicial so as to outweigh the probative value." *See State v. Franklin*, 456 S.E.2d 357, 361 (S.C.) (holding that "[t]o constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one' ") (quoting *State v. Alexander*, 401 S.E.2d 146, 149 (S.C. 1991) (adopting unfair prejudice portion of Federal Rule of Evidence 403 as South Carolina law)), *cert. denied*, 116 S. Ct. 357 (1995); *State v. Campbell*, 191 S.E.2d 770, 773 (S.C. 1972) (noting that court should exclude photographs that "are calculated to arouse the sympathy or prejudice of the jury," that "are entirely irrelevant," or that are "not necessary to substantiate facts").

We also note that the State appears to concede that the mere fact that the photographs in Set 1 were relevant and material evidence does not support a finding that the jury was biased by viewing the photographs or that its deliberations were adversely affected. Undoubtedly, as counsel for Petitioners noted during oral argument, all relevant evidence by definition is prejudicial to some extent in that it is intended to support the proponent's case and prejudice the opponent's.[18] But, the "prejudice"

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[18] The dissents attempt to make much of Petitioners' counsel's "concession" in argument before the court that the Set 1 photographs were "prejudicial." This attempt is misdirected. Counsel acknowledged, as she must, that all relevant evidence

engendered simply by the jury's viewing of relevant evidence, when that evidence could not improperly bias the jury or adversely affect its deliberations, generally could not support a finding of manifest necessity for a mistrial.

Consideration of the analysis leading the Supreme Court to conclude in *Arizona v. Washington* that the state trial judge had not abused his discretion in granting the prosecution's motion for a mistrial over the defendant's objection is instructive. During the opening argument in Washington's state criminal trial, defense counsel informed the jury that the prosecution had intentionally withheld exculpatory evidence from the defense in a prior trial and that, as a result of the prosecution's misconduct, the state supreme court had ordered that Washington be given a new trial. *Arizona v. Washington*, 434 U.S. at 499. The Supreme Court found this information – that the prosecution had committed misconduct in the prior trial – to be immaterial, inadmissible, and highly inflammatory. *See id.* at 510-11. And, for this reason, the Supreme Court began its analysis of whether the trial court had abused its discretion in granting the mistrial on the premise that the improper argument "may have affected the impartiality of the jury." *Id.* at 511. The type of bias the Supreme Court considered to be germane in evaluating the possibility that the jury's deliberations

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is by definition "prejudicial." However, Petitioners' counsel was careful to draw the distinction between evidence that is unduly or improperly prejudicial and evidence that is prejudicial only in the sense that it is relevant. Petitioners have consistently maintained that the Set 1 photographs were prejudicial only in the sense that they were relevant, not in the sense that they could have improperly biased the jury.

would be adversely affected, and thus to determining whether manifest necessity existed for a mistrial, was that arising from the exposure of the jury to inadmissible and inflammatory material. *See id.* at 514-15. Clearly, no fair reading of *Arizona v. Washington* can support a conclusion that a jury's viewing of relevant, largely cumulative, and unobjectionable photographs could give rise to the type of adverse effect on the jury's deliberations sufficient to create a manifest necessity for a mistrial.

Rather, the State asserts that Officer Counts did not lay a proper foundation for the jury's consideration of the photographs in Set 1 because he did not identify the photographs in Set 1 by number in the presence of the jury and because he did not specifically explain to the jury either the location depicted in the photographs or their relevance. The State claims that in the absence of this proper identification and foundation testimony, the jury's viewing of the photographs unduly prejudiced the prosecution because the jury may have been confused. It asserts that without this proper foundation testimony, the jury may not have been able to determine that the different photographs depicted the same areas marked with yellow tape and, thus, may have been misled as to the location of these areas. Further, the State contends that in the absence of foundational proof of serological tests performed on the red spots shown in the photographs in Set 1, the jury could not properly have relied on photographs to conclude that the red spots were blood. We cannot agree.[19]

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[19] Not content with the arguments advanced by the State, one of the dissenting members of the court contends that the

The State cites no authority for the proposition that before a jury may properly view photographs of a crime

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majority is incorrect in concluding that the State's principal argument is that the potential for jury bias resulted from the jury's viewing of the Set 1 photographs without the authentication necessary for their formal admission. To the contrary, this has consistently been the State's position in its brief and at oral argument.

In response to the repeated questions by various members of the en banc court during oral argument to the State's attorney concerning how the prosecution's case had been prejudiced by the jury's viewing of the Set 1 photographs, the State acknowledged that it previously had conceded that the photographs themselves were not prejudicial and maintained on at least six separate occasions that any prejudice to the prosecution resulted from the fact that the jury saw the Set 1 photographs before they were properly authenticated and formally admitted into evidence. Following these repeated assertions, the dissenting judge asked:

> [O]n top of that, I asked you a specific question during a three-hour panel hearing in which you quite clearly argued that it . . . was significant that you could see clearly the spots [of blood] on the unadmitted photographs. . . . Defense counsel in response to my question specifically said that, "Yes, it was prejudicial to the government's case." But, in response to [the court's] question today you say that it wasn't prejudicial except to the extent that in some technical sense they hadn't been authenticated. Do you have an argument that they were prejudicial? That's what we're interested in – a substantive argument of prejudice to the government's case. If not, then you've got to argue under *Arizona* that prejudice isn't required, which you just conceded . . . it is.
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> STATE'S ATTORNEY: We don't argue that prejudice is not required. We submit that . . . prejudice under *Arizona*

scene, the sponsoring witness must refer to each photograph by exhibit number, describe the location depicted in each photograph individually, or explain the relevance

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v. Washington, the way that I submit that Judge Wilkins is interested in prejudice, *is* required.

COURT: O.K., then what is the prejudice . . . ?

STATE'S ATTORNEY: The prejudice, I submit is, first off, the fact the photographs which were not . . .

COURT: Other than that. The substantive case of [prejudice to] the prosecution. I assume there was no prejudice to the prosecution at this point in these proceedings.

STATE'S ATTORNEY: Certainly, [they were] prejudicial to the prosecution because [the defense] never sought to introduce those photographs.

In response to further questions from the members of the court to the State's attorney concerning the possibility that its case was prejudiced by the jury's viewing of the Set 1 photographs, the State reiterated that the failure to formally introduce the photographs into evidence may have led to juror confusion. In an apparent attempt to get to the bottom of the matter one final time, the dissenting judge again questioned the State's attorney concerning whether he was asserting that the fact that the photographs in Set 1 showed the blood more clearly was independently significant. Conceding that it was not, the State's attorney responded that Officer Counts had testified to the existence of blood at the scene.

Having again reviewed the briefs and arguments before the court, we remain confident that the State has now abandoned any argument that the photographs themselves could have biased the jury. But, even if the dissent were correct that the State had pursued this contention that the jury may have been biased as a result of viewing the Set 1 photographs because they disclosed information that was different from and more prejudicial than the photographs in Set 2, this claim would lack merit for the reasons discussed at length in the text.

of each of the photographs individually. In other words, the State offers no support for its contention that this testimony is a necessary part of the foundation for admission of photographs into evidence in South Carolina state courts. This is not surprising because under South Carolina law, "[n]ormally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved." *Campbell*, 191 S.E.2d at 773.[20]

There is no dispute that Officer Counts was present at the scene when the photographs were taken, either by himself or another SLED agent, or that the photographs accurately represented the scene outside the Silvers' mobile home. As the district court found, these facts were adequately established during Officer Counts' testimony; so, a proper authentication was laid for the admission of the photographs.[21] This finding is buttressed by the fact

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[20] The dissents complain that we are delving into South Carolina evidentiary law concerning matters that are quintessentially within the discretion of the trial judge. As we have made plain, however, the state trial judge refused to rule on the admissibility of the Set 1 photographs. So, we are not called upon to speculate over the correctness of a contemporaneous ruling. Instead, our examination ensues from the State's post hoc assertion that a proper foundation for admission was not laid.

[21] Although the State does not assert that the district court erred in rendering this factual finding based on the evidence presented during the hearing, one of the dissenting members of the court suggests that the district court improperly failed to defer to a contrary statement made by the state trial judge. However, because Petitioners were not provided with a full, fair, or adequate hearing at the state level, to the limited extent

that the photographs in Set 2 were admitted into evidence with the same foundational testimony as those in Set 1 – except for the fact that the Set 2 photographs were referred to by number – and without objection from the prosecuting attorney. Additionally, there is no requirement of South Carolina law that before crime scene photographs showing what appears to be blood may be admitted into evidence, the results of a serological test first must be introduced.

Moreover, even if the State were correct that Officer Counts had not laid the proper foundation for admission of the photographs into evidence, there was no possibility that the jury could have been confused by seeing the photographs in Set 1 prior to having heard this testimony. Officer Counts had testified that yellow tape marked three areas on the ground outside the Silvers' mobile home where what appeared to be blood was located. In addition, he had testified that these areas were located to the left of the mobile home and just beside the roadway, and he had marked the location of these three areas on an overlay of a diagram of the crime scene prepared by the prosecution. Further, he testified that all of the photographs (Sets 1 and 2) showed the same scene but from different angles. Given this testimony, it strains credibility to suggest that the Set 1 photographs could have misled the jury into believing that there were a greater number of areas where blood was located or that the blood was discovered in a location other than the one

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that the state trial court resolved the facts, the district court was not bound by them. *See* 28 U.S.C.A. § 2254(d).

indicated by Officer Counts. And, whether the photographs actually showed blood was a matter properly within the jury's discretion; no additional testimony or foundation was necessary to guide their discretion prior to viewing the photographs.

Finally, in determining whether a high degree of necessity was shown for the mistrial, it is important to bear in mind that there is simply no rational argument that viewing the photographs in Set 1 somehow improperly biased the jury. *Cf. Arizona v. Washington*, 434 U.S. at 510-11 (beginning analysis of whether trial court exercised sound discretion with the premise that counsel's improper and highly inflammatory remarks to the jury during opening argument may have affected the jury's impartiality). As the State previously conceded, the only error was in the fact that the photographs had not been formally admitted into evidence. The State's own witness, Officer Counts, testified that what appeared to be blood had been located at the scene outside the Silvers' mobile home. And, the difference in perspective of the two sets of photographs did not add any information concerning the location of the blood spots or tire tracks because Officer Counts testified, and indicated on a diagram prepared by the State, where SLED investigators had located blood at the scene and the location of the tire tracks.

Particularly revealing is the testimony of one of the prosecuting attorneys given before the district court: He testified that the prosecution did not actually want to move for a mistrial and that the reason the motion was made was because the state trial judge sent a signal as big as "I have ever seen" that he desired the prosecution to so

move.[22] J.A. 428. In view of the state trial judge's "signal" to the prosecution that the court was seeking a motion for a mistrial, it is understandable why the motion was made. This admission is strong evidence that the prosecution did not actually believe that the jury had been biased or that its deliberations were somehow affected as a result of seeing the photographs in Set 1. Indeed, nowhere in the prosecuting attorney's testimony did he indicate that the prosecution was in some way prejudiced by the jury's viewing of the Set 1 photographs. And, the

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[22] Theorizing why, in his opinion, the state trial judge might have been motivated to invite a mistrial motion from the prosecution, this prosecuting attorney speculated that he thought the state trial judge may have been influenced by an incident that occurred earlier in the trial in which one of the defense attorneys looked in a prosecution notebook. According to the undisputed evidence presented before the district court, this incident was brought to the attention of the state trial judge, who raised the matter with defense counsel at a bench conference. Counsel denied wrongdoing, stating that she had inadvertently looked in the notebook while attempting to find her own. The state trial judge made no finding of wrongdoing and did not reference this incident in granting the mistrial.

Later, this incident was addressed in a footnote to the original order entered denying Petitioners' motion to dismiss their indictment on double jeopardy. After this order – which was prepared by the prosecution and signed by the state trial judge without change – was entered, defense counsel moved the state trial judge to amend the order and omit reference to the incident. The prosecution did not object to removal of this language, and the state trial judge entered the amended order, which is included as an appendix to one of the dissents.

This record does not support a suggestion that the state trial judge concluded that defense counsel engaged in a pattern of misconduct or that the state trial judge based its decision to grant the mistrial on this basis.

prosecution's lack of awareness of the serological test that had been performed and its decision not to conduct further serological testing to attempt to determine whose blood was found further illustrates the fact that the prosecution did not believe that the existence of drops of blood outside the mobile home was significant; it was undisputed that Gilliam bled from a gunshot wound to the lower leg and, therefore, that blood was present at the scene outside the mobile home.

Alternatively, the State argues that even if the jury was not biased by viewing the Set 1 photographs, the state trial judge nevertheless properly may have concluded that the ends of public justice were served by the grant of a mistrial because the procedures for the proper admission of evidence for the jury's consideration had been violated through defense counsel's negligence. In fact, one of the prosecuting attorneys testified that this factor, rather than any perceived prejudice to the prosecution's case, motivated the decision to seek a mistrial. In our view, this question forms the true issue raised by this appeal: Does a trial judge exercise sound discretion in concluding that a mistrial is supported by the ends of public justice when defense counsel negligently permits the jury to view photographs that have not been admitted into evidence, but that undoubtedly could and would be admitted if so offered?

In examining some of the situations in which the ends of public justice were held to support the grant of a mistrial, the Supreme Court has written:

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be

> reached but would be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

Somerville, 410 U.S. at 464.

As noted above, because these photographs could have been admitted into evidence, could not have caused the jury to have been confused or misled, and could not have biased or inflamed the jury, there is no basis upon which to conclude that the jury could not have reached an impartial verdict.

And, any error in the jury's viewing of these photographs would not have amounted to reversible error under South Carolina law. First, because there was no reason why the photographs could not have been formally admitted by the defense, any technical error in the jury's viewing of the photographs could have been easily remedied before the case was submitted to the jury. Second, even if the technical error could not have been corrected, this error could not possibly have resulted in reversal of Petitioners' convictions because harmless error does not necessitate the reversal of a South Carolina criminal conviction. *See State v. Gaskins*, 326 S.E.2d 132, 141 (S.C. 1985), *cert. denied*, 471 U.S. 1120 (1985). The erroneous consideration of evidence is not a ground for reversal unless it results in prejudice. *See State v. Knight*, 189 S.E.2d 1 (S.C. 1972). And, when a jury considers a crime scene photograph, when other photographs of the

same scene are already in evidence without objection, no prejudice can be inferred. *See State v. Bellue*, 194 S.E.2d 193, 194 (S.C. 1973). Moreover, a jury's exposure to evidence that is admissible, but not admitted, does not require reversal of a conviction. *See Campbell*, 191 S.E.2d at 772-73 (stating that display before the jury by the solicitor of an axe found at the crime scene did not warrant reversal of defendant's conviction, when although not admitted into evidence, the axe properly could have been admitted). Thus, there is no possibility that if the trial had resulted in a conviction of Petitioners, the verdicts would have been reversed on appeal because the jury viewed the Set 1 photographs.

Although the circumstances presented to the state trial judge created neither a risk that the jury would be unable to reach an impartial verdict nor a risk that a verdict of guilty would have been overturned on appeal or collateral review, an argument is made that the state trial judge's grant of a mistrial under these circumstances nevertheless was supported by the ends of public justice. A trial judge must be permitted to ensure the integrity of the trial and its evidentiary procedures through the grant of a mistrial, the State maintains, and any rule that fails to recognize this institutional necessity would place unscrupulous defense counsel in a "no lose" situation: Unethical defense counsel will be undaunted from violating evidentiary procedures because, in the event a mistrial is granted, they obtain a real opportunity for a reviewing court to conclude that retrial is barred by the Double Jeopardy Clause or, in the event the trial judge does not grant a mistrial, they obtain the benefit of having the jury

consider unadmitted or improperly admitted evidence. This parade of horribles rings hollow.

Undoubtedly a trial judge possesses wide latitude to maintain control over the courtroom to ensure the integrity of the proceedings, but the traditionally broad discretion afforded in such matters necessarily accedes to the Constitution, requiring that the exercise of the discretion in favor of granting a mistrial over a defendant's objection and after the jury has been sworn be exercised only when a high degree of necessity or the ends of public justice compel the act. We are unable to accept the State's argument that a trial court may deprive a defendant of his constitutionally protected right to have an empaneled and unbiased jury decide his guilt on the ground that his attorney committed a technical and harmless error.[23] *See Harris v. Young*, 607 F.2d 1081, 1086 (4th Cir. 1979) (concluding that trial court did not exercise sound discretion in granting mistrial in part because "there [was] no indication that the traditional remedies for attorney misconduct, including censure, reprimand, contempt, or recommendation of disciplinary proceedings were not available"), *cert. denied*, 444 U.S. 1025 (1980). And, the State's argument is particularly unconvincing on the present facts because there has never been any allegation that all of the defense attorneys were responsible for the error. Thus, the Petitioners whose separate counsel were

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[23] The State asserted at oral argument that even if the photographs in Set 1 had been exact duplicates of photographs that had already been admitted into evidence, the state trial judge would have been justified in concluding that a mistrial was manifestly necessary.

not responsible for the error were deprived of a constitutional right in the absence of even unintentional harmless error by their own attorney.

Our conclusion that the ends of public justice do not support the grant of a mistrial under the present circumstances – *i.e.*, when admissible and largely cumulative evidence that was not unduly prejudicial, that would not cause juror confusion, and that had been properly authenticated, was inadvertently placed where the jury could view it – does not signal that a trial judge would be incorrect in concluding that the ends of justice supported the grant of a mistrial in other circumstances. For example, when evidence that would not have been admitted, or that may have biased the jury in some way, was aired before the jury, a mistrial may very well be appropriate. Accordingly, unscrupulous defense counsel will find no encouragement in our opinion to evade the rules of evidence: If counsel were to air evidence that might tend to improperly bias the jury or adversely affect its impartiality, any reviewing court applying the teachings of *Arizona v. Washington* would conclude that the trial judge acted within his discretion in granting a mistrial. And, if counsel seeks to improperly place only innocuous, admissible evidence before the jury, no advantage is gained, and a significant risk exists that counsel may find that they face sanctions for their conduct. All in all, we do not view this scenario as creating any real possibility for abuse.

In sum, we conclude that neither manifest necessity nor the ends of public justice required a mistrial.

B. *Do Other Factors Indicate that the State Trial Judge Exercised Sound Discretion?*

The other factors that the Supreme Court has indicated are relevant to a determination of whether a trial court exercised sound discretion in granting a mistrial also weigh against that finding here. First, as the district court found, the state trial judge acted precipitately: He refused defense counsel's request to determine whether the jury had actually seen the photographs in question; he refused to determine whether Officer Counts had in fact authenticated the photographs during his testimony; he refused simply to look at the photographs and rule on their admissibility; and he refused to allow defense counsel's request to recall Officer Counts and formally move the admission of the photographs into evidence. The manner in which the state trial judge examined the appropriateness of the grant of a mistrial furnishes no indication of the exercise of sound discretion.

In addition, the state trial judge never evinced any awareness that the grant of a mistrial might implicate or deprive Petitioners of their constitutional right to have the empaneled jury decide their guilt. Indeed, at no point during the brief colloquy with counsel concerning the State's motion for a mistrial did the state trial judge allude to the Fifth Amendment, the Double Jeopardy Clause, or the proposition that in order to retry a criminal defendant after a mistrial has been granted over his objection, manifest necessity or the ends of public justice must require that it be granted.

Finally, the state trial judge ignored an obvious and adequate alternative to the grant of a mistrial. *See United*

States v. Sloan, 36 F.3d 386, 400 & n.11 (4th Cir. 1994); *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993) ("If alternatives existed, then society's interest in fair trials designed to end in just judgments was not in conflict with the defendant's right to have the case submitted to the jury.") (internal quotation marks & citation omitted); *Harris*, 607 F.2d at 1085 n.4 ("If obvious and adequate alternatives to aborting the trial were disregarded, this suggests the trial judge acted unjustifiably."). The State conceded in argument before this court that there was nothing to prevent the state trial judge from simply allowing Officer Counts (who was under subpoena and available) to be recalled to the witness stand to have the photographs formally introduced, as defense counsel offered to do prior to the state trial judge's ruling on the prosecution's motion for a mistrial.[24] Without question, this would have cured the technical, and only, error that had occurred. Thus, in the absence of any prejudicial

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[24] The State asserts that if the defense had been permitted to recall Officer Counts to the stand in order to formally move the introduction of the photographs, the jury might have placed too much emphasis on the Set 1 photographs. This argument obviously lacks merit. Litigants are always free to highlight evidence of their choosing by referring back to it several times during a witness' examination or by questioning multiple witnesses about the same evidence. Consequently, if the Set 1 photographs had been introduced into evidence during Officer Counts' testimony, nothing would have prevented defense counsel from emphasizing these photographs to the jury if it chose to do so. Accordingly, even if we assume that the introduction of the photographs would have to have occurred before the jury, recalling Officer Counts to the stand to do so would not have unduly prejudiced the prosecution.

error, the state trial judge refused to consider or implement an obvious and completely adequate course of action to correct any possible error in the jury's having viewed cumulative photographs that had not been formally moved and received into evidence. This factor, then, also weighs in favor of a conclusion that the state trial court acted irresponsibly in granting the mistrial.[25]

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[25] One dissent considers the order entered by the state trial judge denying Petitioners' motion to dismiss their indictments as essential to a determination that the state trial judge did not act precipitately and criticizes us for focusing on the circumstances surrounding the grant of the mistrial at the time it occurred rather than the later order. Our lack of focus on this order – which was filed some five months after the mistrial had been granted – results from our conclusion that the order adds virtually nothing to the analysis of whether the state trial judge acted precipitately in granting the mistrial. With the exception of the state trial judge's statement that he considered giving a curative instruction, all of the substantive factual information to which the dissent points is already reflected in the trial transcript and considered in the text of the majority opinion. To the extent that the order further discloses that the state trial judge considered and rejected giving a curative instruction, it is irrelevant. We would not fault a state trial judge for declining to pursue a remedy that might not have cured possible prejudice to the prosecution; indeed, we expressly note that a trial court acts well within the broad discretion afforded to it if it declines to impose a remedy that could fail to cure potential jury bias. The problem here is that the state trial judge granted the mistrial in the absence of any circumstances that could have improperly biased the jury and failed to pursue a remedy that indisputably would have cured the potential bias, if any had been shown. Further, it is not surprising that the order discusses double jeopardy concerns, given that the Petitioners' motion that precipitated the order was based on the Double Jeopardy Clause. But, this discussion cannot reasonably impute that concern back to the time the state trial judge acted. And, in fact,

C. *Summary*

In sum, we agree with the district court that the state trial judge did not exercise sound discretion in granting the mistrial. The record will not support a conclusion that manifest necessity existed: The jury was not exposed to any inadmissible evidence; the photographs in Set 1 could not have adversely affected the impartiality of the jury; and in light of Officer Counts' testimony, the Set 1 photographs did not present any realistic potential for juror confusion. Additionally, the grant of the mistrial was not compelled by the ends of public justice: There was no reason a just verdict could not have been reached by the jury; there was no error that could have resulted in reversal if the trial had ended in conviction; and there was no necessity for the state trial judge to grant a mistrial to vindicate any institutional interest protecting the integrity of evidentiary procedures. Moreover, the state trial judge acted precipitately and ignored an obvious and completely adequate alternative offered to remedy any error arising from the jury's consideration of the photographs.

In reaching this conclusion, we consider it important to emphasize what we do not hold. We are not called upon to second guess a discretionary ruling on the admissibility of evidence by a state trial judge in a criminal proceeding or a finding that the jury was potentially biased or prejudiced. The state trial judge plainly refused to rule on the admissibility of the Set 1 photographs and

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the order does not purport to say that the state trial judge actually considered the double jeopardy implications of its actions before granting the mistrial.

made no finding that the impartiality of the jury had been, or may have been, affected by viewing the photographs in dispute. Nor are we faced with a situation in which the admissibility of evidence or the possibility of juror bias is subject to some doubt. Indeed, the State has repeatedly conceded that the Set 1 photographs were admissible and without question properly would have been admitted into evidence during the first trial if they had simply been moved into evidence when Officer Counts was on the stand; and, the testimony of Officer Counts foreclosed any possibility of juror confusion. As a result, we do not confront a situation in which a state trial judge has exercised his discretion to choose a mistrial in lieu of some other measure designed to remedy juror bias or prejudice.

If the situation facing this state trial court could be found to support a conclusion that manifest necessity or the ends of public justice required the grant of a mistrial, those words have little meaning, and the standard for trial judges to employ in deciding the appropriateness of the grant of a mistrial may as well be articulated in terms of whether a trial judge in good faith deems the mistrial advisable. Moreover, if the circumstances surrounding the grant of this mistrial could be found to sustain a determination that the state trial judge exercised sound discretion in granting a mistrial, there would be little point to providing any level of judicial review of such decisions. For better or worse, however, the Double Jeopardy Clause has been construed by the Supreme Court to permit the retrial of a defendant after a mistrial is granted over his objection only when manifest necessity or the ends of public justice compelled that the mistrial be

granted, and the Supreme Court has directed reviewing courts to examine the ruling of the trial judge to determine whether sound discretion was exercised in granting the mistrial. Were we to hold otherwise, the protection afforded by the Double Jeopardy Clause would no longer safeguard a defendant's right to have a trial completed by an empaneled jury – a right long held to be encompassed within the protections afforded by the Clause – but would provide protection only against demonstrable prosecutorial or judicial misconduct. Further, the review for sound discretion reaffirmed in *Arizona v. Washington* would be relegated to a ministerial rubber stamp of a state trial judge's decision to grant a mistrial irrespective of the irrationality of that decision. While we abhor the result – because, as in all cases in which the Double Jeopardy Clause bars reprosecution, the defendants will not be held to account for their alleged crimes – our application of the law as we understand it compels us to affirm the judgment of the district court.

III. Younger *Abstention*

Although the State did not initially raise this issue,[26] it now asserts that the abstention doctrine of *Younger v.*

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[26] Because the State did not rely upon the *Younger* abstention doctrine in opposing Petitioners' request for a temporary stay of the state criminal proceedings pending resolution of the merits of the § 2254 petition, we might be justified in refusing to consider this argument. *See Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.") (internal quotation marks omitted). Nevertheless, because the State advances the abstention

Harris, 401 U.S. 37 (1971), barred the district court from granting federal habeas corpus relief. It maintains that having concluded that there was no bad faith on the part of the prosecution in proceeding with the trial, the court should have declined further review.

In *Younger*, the Supreme Court plainly declared that federal court equitable interference with state criminal proceedings should not be undertaken except in the most narrow and extraordinary of circumstances. Basic tenets of equity jurisprudence dictate that a court " 'of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' " *Kugler v. Helfant*, 421 U.S. 117, 123 (1975) (quoting *Younger*, 401 U.S. at 43-44). And, concerns of comity and federalism justify additional caution when a federal court is petitioned to intervene in a pending state criminal action. *Id.* Consequently, federal courts may intervene in state criminal proceedings, either by way of declaratory relief or by injunction, only when there has been a "showing of bad faith, harassment, *or any other unusual circumstance that would call for equitable relief.*" *Younger*, 401 U.S. at 54 (emphasis added); *Kugler*, 421 U.S. at 123 ("[I]n the absence of exceptional circumstances creating a threat of irreparable injury both great and immediate, a federal court must not intervene by way of either injunction or declaratory judgment in a pending state criminal prosecution.") (internal quotation marks omitted).

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argument now, and because the issue is one of considerable importance, we will address it.

It is undisputed that the state proceeding against Petitioners was not undertaken in bad faith or for purposes of harassment. Moreover, there is no suggestion that the prosecutors who sought the mistrial on behalf of the State during the first trial or the judge who granted it were acting in bad faith in doing so. Nevertheless, a federal court may provide equitable intervention in a state criminal proceeding " 'even in the absence of the usual prerequisites of bad faith and harassment' " when " 'extraordinary circumstances in which the necessary irreparable injury can be shown' " are present. *Kugler,* 421 U.S. at 124 (quoting *Younger,* 401 U.S. at 53).

The State argues that Petitioners have not shown extraordinary circumstances for federal court intervention in the state criminal proceedings because they have failed to show that they will suffer irreparable injury if they are forced to undergo the trial of their criminal charges and raise their double jeopardy claim on direct appeal if they are convicted. The State stresses that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution alone [does] not constitute 'irreparable injury.' " *Id.* (quoting *Younger,* 401 U.S. at 46).

The State is correct that ordinarily irreparable harm cannot be shown simply because a defendant will be subject to a single criminal prosecution in which he must raise any constitutional claims he wishes as a defense to his conviction. "The policy of equitable restraint expressed in *Younger v. Harris* . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Id.* However,

because the Double Jeopardy Clause of the Fifth Amendment protects not only against multiple convictions but also "against being twice put to *trial* for the same offense," *Abney v. United States*, 431 U.S. 651, 660-62 (1977), a portion of the constitutional protection it affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level,[27] *see Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 303 (1984); *Abney*, 431 U.S. at 662. Thus, the irreparable deprivation of this Fifth Amendment Double Jeopardy right is an extraordinary circumstance warranting federal court equitable intervention in Petitioners' state criminal proceeding.

Our conclusion is in accord with the decisions of the other courts of appeals that have addressed this question. They have unanimously recognized that a colorable claim that a second trial will violate a defendant's double jeopardy right is a preeminent example of one of the very few extraordinary circumstances justifying federal court intervention in a pending state criminal proceeding. *See Satter v. Leapley*, 977 F.2d 1259, 1261 (8th Cir. 1992); *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 964 (1993); *Showery v. Samaniego*, 814 F.2d 200, 201 n.5 (5th Cir. 1987); *Doe v. Donovan*, 747 F.2d 42, 44 (1st Cir. 1984) (per curiam); *United States ex rel. Stevens v. Circuit Court of Milwaukee Co., Wis. Branch VIII*, 675 F.2d

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[27] Obviously, Petitioners already had been required to defend themselves in one criminal proceeding, and it was their second criminal trial from which they sought federal habeas relief.

946, 947-48 (7th Cir. 1982); *Gully v. Kunzman*, 592 F.2d 283, 286-87 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979); *Drayton v. Hayes*, 589 F.2d 117, 120-21 (2d Cir. 1979); *United States ex rel. Webb v. Court of Common Pleas of Philadelphia County*, 516 F.2d 1034, 1037-39 (3d Cir. 1975).

Moreover, this conclusion is buttressed by the fact that the Supreme Court has never refused on the basis of the *Younger* abstention doctrine to decide the merits of a double jeopardy claim raised in a § 2254 petition. Instead, the Supreme Court has on several occasions addressed whether a forthcoming second state criminal trial was barred on double jeopardy grounds. *See Lydon*, 466 U.S. at 304-13; *Arizona v. Washington*, 434 U.S. at 503-17. In *Lydon*, the Supreme Court specifically ruled that a state habeas corpus petitioner had satisfied the § 2254 custody and exhaustion requirements to permit federal habeas review of his double jeopardy claim prior to his retrial on state criminal charges. Discussing the exhaustion requirement, and without referring to *Younger*, the Court wrote that because the Double Jeopardy Clause "protects interests wholly unrelated to the propriety of any subsequent conviction, a requirement that a defendant run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court, would require him to sacrifice one of [its] protections." *Lydon*, 466 U.S. at 303 (internal quotation marks & citation omitted). *See generally Winston v. Moore*, 452 U.S. 944 (1981) (Rehnquist, J., dissenting) (without indicating that *Younger* abstention principles applied, opining that Court should have granted certiorari to address the merits of the double jeopardy claim); *Willhauck v. Flanagan*, 448 U.S. 1323, 1325

(Brennan, Circuit Justice 1980) (noting that double jeopardy claims may present an exception to *Younger* abstention); *Mincey v. Arizona*, 434 U.S. 1343, 1344 (Rehnquist, Circuit Justice 1977) (distinguishing claim that second state trial should be stayed based on alleged error in introduction of evidence from a claim that the second trial would violate double jeopardy and stating that the former should be raised through the normal state appellate channels).

Equitable federal court interference with ongoing state criminal proceedings should be undertaken in only the most limited, narrow, and circumscribed situations. However, when the record demonstrates that a second state criminal trial will constitute a violation of the defendant's double jeopardy rights, federal court intervention is appropriate.

IV. *CONCLUSION*

Our decision that the Double Jeopardy Clause bars a retrial of Petitioners is an enormously difficult one. Frequently, when this court concludes either on direct appeal or on habeas corpus review that a trial judge has committed an error during a criminal trial, we are able to determine that the error was a harmless one and does not require that the conviction be set aside. And, even when this court concludes that a ruling by a trial judge in a criminal prosecution was erroneous and prejudicial, in the vast majority of cases the defendant may be retried. The unique constitutional protection afforded by the Double Jeopardy Clause, however, dictates that when a trial court abuses the ample discretion afforded to it in

granting a mistrial in a criminal case over a defendant's objection, the defendant may not be retried. As a result of the error committed by the state trial judge in Petitioners' first trial, the State of South Carolina may not retry them.

It is our duty to apply the law to uphold the convictions of those who are unable to demonstrate harmful error and to order appropriate relief for those who do. And, just as surely, it is our duty to apply to the best of our understanding the interpretation given to the Constitution by the Supreme Court even when that application prevents the retrial of criminal defendants.

Chief Judge Ervin, Judge Hall, Judge Murnaghan, Judge Hamilton, Judge Williams, Judge Michael, and Judge Motz join in this opinion.

AFFIRMED.

Volume 2 of 2

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

DARRELL WAYLAND GILLIAM, JR.; PAMELA OWINGS; JAMES MATTHEW SWAIN, *Petitioners-Appellees,* v. JAEMS LEE FOSTER, Sheriff of Newberry County; CHARLES M. CONDON, Attorney General for the State of South Carolina; JAMES W. JOHNSON, JR., Circuit Court Judge of South Carolina. *Respondents-Appellants.*	No. 95-2434

Appeal from the United Sates District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., District Judge.
(CA-95-1742-17AJ, CA-95-1743-17AJ, CA-95-1744-17AJ)

Argued: September 26, 1995

Decided: January 29, 1996

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion, Judge Wilkins wrote the majority opinion in which Chief Judge Ervin and Judges

Hall, Murnaghan, Hamilton, Williams, Michael, and Motz joined; Judge Wilkinson wrote a dissenting opinion in which Judges Russell, Widener, Niemeyer, and Luttig joined; Judge Niemeyer wrote a dissenting opinion in which Judge Widener joined; and Judge Luttig wrote a dissenting opinon in which Judges Russell, Widener, Wilkinson, and Niemeyer joined.

COUNSEL

ARGUED: Donald John Zelenka, Assistant Deputy Attorney General, Columbia, South Carolina, for Appellants, Joy Scherffius Goodwin, LEVY & WOODWIN, Columbia, South Carolina, for Appellees. **ON BRIEF:** J. Christopher Mills, FAIREY, PARISE & MILLS, Columbia, South Carolina, for appellee Gilliam; Samuel M. Price, Jr., Newberry, South Carolina, for Appellee Owings.

OPINION

WILKINSON, Circuit Judge, dissenting:

I respectfully dissent. When a mistrial is declared through no fault of the prosecution and indeed as the direct result of defense error, a federal court may not enjoin a subsequent state criminal trial while it is ongoing. The majority disregards this fundamental axiom, leaving two mainstays of our federal system, *Younger v. Harris*, 401 U.S. 37 (1971), and *Arizona v. Washington*, 434 U.S. 497 (1978), in a badly damaged state.

I.

I will first take up the damage to the *Younger* decision. That damage falls into two broad categories: (1) doctrinal damage to *Younger*; and (2) the practical damage of disruption visited upon the relationship of state and federal courts. The damage is compounded by the fact that the pronouncements in this case are those of an en banc court.

The doctrinal damage to *Younger* stems from the majority's insistence on a duty on the part of federal courts to intervene in ongoing state criminal proceedings even when defense error causes the declaration of an earlier mistrial. The majority adopts a single standard for federal judicial intervention into ongoing state trials – one which ignores the source of the earlier error in state court. In so doing, the majority also ignores two critical findings that the district court made in this very case: first, that "[t]here is nothing in the record to indicate that the prosecutors acted with bad faith or improper motive in moving for a mistrial," and, second, that the trial judge found "that it was defense counsel who erroneously placed Photo Set 1 on the jury rail," thus precipitating the mistrial.

Intervention under these circumstances turns *Younger* on its head. *Younger* envisioned the federal courts as a last line of defense against gross abuses of prosecutorial power. *See Younger*, 401 U.S. at 47-53. It never envisioned episodic federal interventions into ongoing state proceedings whenever a federal habeas court thinks that the earlier grant of a mistrial by a state trial judge was simply a mistake. *See Id.* at 43-47. The language of *Younger* makes

plain that the evil sought to be remedied by federal equitable intervention was that of prosecutorial malfeasance or bad faith. *Id.* at 53. The Court declared that the "fundamental policy against federal interference with state criminal prosecutions," *Id.* at 46, could only be abandoned in the face of "bad faith, harassment, or any other unusual circumstances that would call for equitable relief." *Id.* at 54. As the Court elaborated in a companion case: "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." *Perez v. Ledesma,* 401 U.S. 82, 85 (1971). Over thirty years of litigation since *Younger* testify to the strength of its presumption against federal interference; in no case has the Supreme Court found the bad faith exception to apply. 17A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure,* § 4255 at 254 (1988).

The majority asserts that double jeopardy claims are an "extraordinary circumstance" warranting a departure from *Younger*. *Younger,* 401 U.S. at 54; *Perez,* 401 U.S. at 85. Such claims are extraordinary, the majority contends, because forcing a defendant to endure a second trial that violates the Double Jeopardy Clause constitutes irreparable injury. This effort ignores the warning of the Supreme Court that the exceptions to *Younger* are narrow. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611 (1975). None of the decisions invoked by the majority to support its proposition are applicable here. None of those courts enjoined, or even contemplated enjoining, an ongoing

state criminal trial, let alone on the basis that an earlier mistrial provoked by defense error was not supported by "manifest necessity." In fact, though they considered the claims presented by state petitioners, most of those courts did not grant relief on the merits. *Satter v. Leapley*, 977 F.2d 1259, 1260 (8th Cir. 1992); *Showery v. Samaniego*, 814 F.2d 200, 201 (5th Cir. 1987); *Doe v. Donovan*, 747 F.2d 42, 44 (1st Cir. 1984); *United States ex rel. Stevens v. Circuit Court of Milwaukee, Wis. Branch VIII*, 675 F.2d 946, 949 (7th Cir. 1982); *Gully v. Kunzman*, 592 F.2d 283, 289-90 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979); *Drayton v. Hayes*, 589 F.2d 117, 118 (2d Cir. 1979). Pre-trial relief was granted in only a few cases. In one, *Younger* was not implicated because the petitioner had not requested an injunction against an ongoing criminal proceeding. *United States ex rel. Webb v. Court of Common Pleas of Philadelphia County*, 516 F.2d 1034, 1039 n.18 (3d Cir. 1975). In the others, the petitioner had been acquitted previously, the most compelling double jeopardy claim a defendant can advance. *Mannes v. Gillespie*, 967 F.2d 1310, 1316 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 964 (1993) (judicial acquittal bars retrial); *Davis v. Herring*, 800 F.2d 513, 519 (5th Cir. 1986) (implicit jury acquittal bars retrial).[1]

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[1] The majority's attempt to invoke Supreme Court decisions to suggest that a double jeopardy claim like the one presented here is an exception to the dictates of *Younger* is unsuccessful. In no case cited by the majority did the Court enjoin an ongoing state criminal trial based on an improper declaration of a mistrial that resulted from a defense error. *Abney v. United States*, 431 U.S. 651 (1977), was a direct appeal, where *Younger*'s admonitions about federalism and comity are not relevant. In *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), the Court considered a double jeopardy claim

The majority creates a broad exception to *Younger* abstention whenever a petitioner on federal habeas raises a claim of double jeopardy. Assuming arguendo that double jeopardy claims do warrant a departure from the doctrine of *Younger* abstention, they should never occasion such a departure when, like here, there is not the slightest accusation of misconduct by the state. See *Gilliam v. Foster*, 61 F.3d 1070, 1089-90 (4th Cir. 1995) (Luttig, J., dissenting). I cannot accept the majority's view that pre-trial habeas review is available irrespective of the nature of the double jeopardy claim. *See Stevens*, 675 F.2d at 948-49 (availability of pre-trial consideration of habeas depends on nature of double jeopardy claim). The principal evil to be avoided in the double jeopardy context is that the state may receive a second shot at a defendant as a result of its own failings or misconduct. For example, in *Downum v. United States*, 372 U.S. 734 (1963), the Supreme Court prohibited retrial when a mistrial was declared due to a prosecutor's inability to locate a critical witness of whose absence the prosecution was aware when it proceeded to trial. *Id.* at 735-38. In *United States v. Shafer*, 987 F.2d 1054 (4th Cir. 1993), this court prohibited retrial when a mistrial was declared due to the prosecution's failure to turn over discovery materials to the defense. *Id.* at 1056-59. The errors in Downum and Shafer suggested that the mistrial would allow the prosecution to "buttress weaknesses in [its] evidence," *Arizona*, 434 U.S. at 507, only to be used to its advantage in a second prosecution.

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unlike the one presented here, and did not grant the requested pre-trial relief.

This danger of prosecutorial overreaching is totally absent here. There is no suggestion that this prosecution was anything other than legitimate. "There is nothing in the record," as the district court found, "to indicate that the prosecutors acted with bad faith or improper motive in moving for a mistrial." There is no indication that the prosecution sought the mistrial to recover from a false start in its case. To the contrary, the state judge declared the mistrial because he was obviously disturbed that the jury was exposed to close-up photographs of the crime scene that were never properly admitted into evidence. The majority, however, disregards both the source and the nature of the error occasioning the mistrial. In so doing, it fashions an exception to *Younger* so broad that federal court intrusion into state criminal trials will become an ordinary, rather than an extraordinary, event. *See Hicks v. Miranda*, 422 U.S. 332, 352 (1975).

To protest generally the dangers of federal intervention into pending state proceedings fails to adequately convey the specific harm visited by this court. Its intervention came at the worst possible moment in the state criminal proceedings – when a trial was well underway. On July 15th, just two days before the start of the state trial, a panel of this court heard argument and affirmed the district court's initial ruling denying petitioners' request for injunctive relief. Then, on the fourth day of the state trial, July 20th, the en banc court reversed the panel's decision and halted the state trial in its tracks. *Younger* itself prohibits intervention in any pending state criminal proceeding. But here a criminal prosecution was far more than *pending;* it had proceeded to trial, and almost as if the judge, jury, witnesses, and parties were

participants in some illicit gathering, the federal court ordered them dispersed.

The majority has, in short, cut *Younger* at its core. It sanctions disruption of an ongoing state criminal trial when there is no allegation whatsoever of misconduct by the state. It disregards the principles of comity and federalism that underpin the *Younger* decision; *Younger* is, after all, designed to "permit state courts to try state cases *free* from interference by federal courts." *Younger*, 401 U.S. at 43 (emphasis added). The intervention countenanced here shows scant respect for the capacity of state courts to safeguard constitutional rights, *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977), and thus creates unwarranted friction between state and federal courts at a time when state courts are, if anything, more responsible guardians of constitutional guarantees than at the time of *Younger* itself.

But to speak generally of the harm to comity and federalism is again to muffle the point. The damage is best calculated by canvassing what happened in this very case. This circuit's intervention forced the state to divert resources away from its ongoing prosecution to lengthy collateral proceedings and litigation of this habeas claim drove the state trial judge to recuse himself. Attorneys argued repeatedly, and often simultaneously, before state *and* federal courts about the admissibility, relevance and prejudicial effect of crime scene photographs exposed to the jury in a state criminal trial. State criminal processes and federal habeas consideration – erratic as it was – proceeded on parallel tracks. The district court denied, and then after prodding from the en banc court, granted the writ of habeas corpus. *Gilliam v. Foster*, 63 F.3d 287

(4th Cir. 1995); *Gilliam*, 61 F.3d 1070. The en banc court issued an emergency stay of an ongoing state criminal trial without hearing argument and without sufficient opportunity to view the disputed photographs. A state jury was sent home and a trial was placed in limbo as a result of the federal intervention. Now, finally, the majority finds a double jeopardy violation and forever bars a murder prosecution of state defendants based on its own view that the state trial judge's response to an admitted evidentiary error at trial was improper.

Incapacitating state criminal processes in this way is precisely what *Younger* sought to avoid. Any disruption of state criminal proceedings undermines a state's ability to enforce its own criminal laws and thus fails to show a "proper respect for state functions." *Younger*, 401 U.S. at 44. And federal disruption is most debilitating when an ongoing trial is cut short; such a mid-course suspension destroys the very purpose of a trial, to require the state and defense to marshall their evidence before a jury in the course of one continuous proceeding.

The majority now attempts a belated exercise in damage control, suggesting that these sorts of disruptions will not happen very often. The events giving rise to the majority's decision, however, are not out of the ordinary. Mistrials occur in state courts with some regularity and for a variety of reasons. The majority's action invites the premature relitigation of all these decisions in federal court. Its opinion contains no limiting principle other than the general and subjective one of manifest necessity. That standard, however, was not developed with the

disruption of ongoing trials in mind. It was never envisioned as a routine exception to the bar on federal equitable intervention in pending state proceedings. Moreover, even when the state ultimately wins, the state loses. It has been forced to suspend its own criminal proceedings while the litigants climb up and down the ladder of the federal system contesting the manifest necessity standard. This court has ignored the wisdom of the *Younger* doctrine. It will surely regret the immeasurable damage it has done to this constitutional canon of our federal system.

II.

I will next address the damage to *Arizona v. Washington*, 434 U.S. 497 (1978).

Arizona reaffirmed that the Double Jeopardy Clause is not an absolute bar to reprosecution when a first trial ends in mistrial over the objection of the defendant. *Id.* at 505; *see also Illinois v. Somerville*, 410 U.S. 458, 463-64 (1973); *Gori v. United States*, 367 U.S. 364, 367-68 (1961); *United States v. Perez*, 9 Wheat. 579, 580 (1824). Arizona emphasizes on at least five separate occasions that a trial court's judgment on the manifest necessity for a mistrial is entitled to "the highest degree of respect." 434 U.S. at 511, 510-14; *see also Somerville*, 410 U.S. at 462; *Gori*, 367 U.S. at 368; *Wade v. Hunter*, 336 U.S. 684, 691-92 (1949). The *Arizona* Court examined the broad spectrum of reasons that give rise to mistrials, noting that some warranted more scrutiny than others. As in *Younger*, the principal concern of the *Arizona* Court was with prosecutorial overreaching or bad faith. On the one hand,

"the strictest scrutiny" is to be applied "when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." 434 U.S. at 508 (footnotes omitted). On the other hand, in a case like *Arizona*, where the defense attorney "aired improper and highly prejudicial evidence before the jury," *id.* at 515, "the trial judge's determination is entitled to special respect." *Id.* at 510. The Court explained in detail why this deference was necessary: "There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors." *Id.* at 513-14 (footnote omitted). It concluded: "In short, he is far more 'conversant with the factors relevant to the determination' than any reviewing court can possibly be." *Id.* at 514 (quoting *Wade*, 336 U.S. at 689).

The *Arizona* lesson is completely lost on the court majority. The majority not only fails to accord deference to the state trial court's decision. It affirmatively takes its seat on the state trial bench. The majority makes a series of evidentiary decisions that are quintessentially within the discretion of a state trial judge. First it finds that the disputed photographs were relevant, largely cumulative, and admissible. Then it weighs the effect of the photographs on the jury and deems any resulting prejudice

insufficient to support a mistrial. Next it sifts through the admitted and unadmitted photo sets, dismissing the possibility that the jury could have been confused or misled by the close-up photographs, even though the jury viewed them without the benefit of explanatory testimony and even though the unadmitted photographs appear to depict blood spots that were not evident on the properly admitted photographs.[2]

The majority's review of every item of evidence is exacting and meticulous. It describes twelve photographs, five that were admitted and the seven that were not, in great detail. For instance, the majority's abbreviated description of four of the five admitted photographs is as follows: They were "taken from near Highway 32, the public roadway in front of the Silvers' mobile home, from the left-hand side of the mobile home . . . [A]ll of them show the same three pieces of yellow tape in the foreground – the closest two pieces are circular in shape, one to the left and one to the right, and one strand of yellow tape is behind the two circular pieces and a few feet closer to the mobile home." The majority applies the

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[2] Officer Counts, the majority maintains, provided sufficient authentication and explanation of the photographs for the jury. The majority's hindsight judgment, however, conflicts directly with the judge's determination at trial, namely, that the photographs were "not in evidence, had not been testified to, [and] had not been identified." While Counts referred to the photographs to refresh his memory, there is no indication that the jury ever knew which photographs he relied upon to do so. Counts' testimony and diagram did provide a general overview of the crime scene, but this did not explain the significance of and exact location depicted in the disputed close-up photographs.

same degree of scrutiny to the unadmitted pictures: "four of [the photographs in Set 1], Exhibits 10, 17, 18 and 19, are close-ups of the three pieces of yellow tape: Exhibit 10 shows a close-up of the circular piece of tape on the left of the photographs in Set 2; Exhibit 17 is a close-up of the two circular pieces of tape shown in the photographs in Set 2; Exhibit 18 is a close-up of the strand of tape behind the two circles of yellow tape in the photographs in Set 2; and Exhibit 19 is a photograph of the circle of tape on the right in the photographs in Set 2. These photographs show red spots within or near the areas marked with the yellow tape more clearly than the photographs in Set 2." In addition, the majority dissects – quoting at length and assessing its meaning – the testimony of Officer Counts, the witness who used the unadmitted photographs to refresh his memory about the crime scene, which he then described for the jury. The state trial, in sum, is rerun in excruciating detail.

This conscientious review of the evidence in all its detail is the majority opinion's strength. Ironically, the very elaborateness of its review reveals a far more fundamental weakness – namely, the complete transposition of appropriate judicial roles and functions. *See Gilliam*, 61 F.3d at 1089 (Luttig, J., dissenting). That a federal habeas court would be reweighing the minutiae of state evidence in this en banc proceeding, devoting months of hindsight to a judgment a state trial court was required to make on the spot, is nothing short of astonishing.

And the lack of deference does not end with the trial court's view of the matter of evidence. The majority finds further fault with the trial judge's explanation of his mistrial decision and his consideration of alternatives to

mistrial. Among its complaints, the majority notes that the trial judge failed to grant defense counsel's request to ask further questions of the jurors, refused to determine if the photographs had been authenticated, refused to rule on the admissibility of the photographs, failed to exhibit proper sensitivity for double jeopardy concerns, and "ignored an obvious and adequate alternative to the grant of a mistrial."

This exacting review of the state court's decision totally eviscerates *Arizona*. The majority applies strict scrutiny to a decision which *Arizona* emphasizes is "entitled to great deference." 434 U.S. at 514; *see also Gilliam*, 61 F.3d at 1084-86 (Niemeyer, J., dissenting). The trial judge – who observed the jury, the litigants, and the witnesses face-to-face – was in a far better position than this court to assess the effects of the jury's exposure to unadmitted close-up crime scene photographs. *Arizona*, 434 U.S. at 510-16; *United States v. Treas-Wilson*, 3 F.3d 1406, 1410 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 739 (1994) (evidentiary rulings regarding crime scene photographs rarely disturbed on appeal). The majority's demand that the trial judge engage in extended debate with defense counsel and articulate reasons for rejecting alternatives to a mistrial is flatly contrary to the teachings of *Arizona*. There, the Supreme Court found that manifest necessity existed even though the mistrial was not "necessary" in a strict sense, the trial judge did not make any finding of manifest necessity, and other trial judges would not have declared a mistrial given the same factual circumstances. 434 U.S. at 511, 516-17; *see also Abdi v. State of Georgia*, 744 F.2d 1500, 1504 (11th Cir. 1984), *cert. denied*, 471 U.S. 1006 (1985); *Cherry v. Director, State Board of*

Corrections, 635 F.2d 414, 418-19 (5th Cir.), *cert. denied*, 454 U.S. 840 (1981).

Although the majority second-guesses the state trial judge no less than one dozen times, his mistrial declaration was fully justified. On the day the trial judge was faced with what he viewed to be a serious breach of the evidentiary admissions process, he knew that the jury, "because of the actions of defense counsel," had examined close-up crime scene photographs that were never offered or admitted into evidence. (Denial of Motion to Dismiss Indictment). The judge also knew that some of the unadmitted pictures showed tire tracks and others showed possible blood spots that were not easily discernable in the admitted photographs. Because many of the unadmitted pictures were close-ups, moreover, it was difficult to determine the location of scenes depicted in the photographs. These photographs were shown to the jury in the early stages of a trial in which the location of the parties and the injuries they sustained promised to be sources of controversy – the defendants evidently intended to raise the defenses of provocation or self-defense.[3]

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[3] It is not fair to claim that the unadmitted photographs were merely cumulative of other evidence or otherwise of little significance. In the second trial the defense vigorously fought to have these photographs admitted. Defense counsel also "all but conceded" in argument before a panel of this court that the photographs were prejudicial to the prosecution because they supported the defense's theories of self-defense or provocation. *Gilliam*, 61 F.3d at 1087 (Luttig, J., dissenting). And in en banc argument before this court, defense counsel also acknowledged that the photographs, because they corroborated the defense's theory of the case, were prejudicial to the prosecution.

The majority mistakes the trial judge's firm handling of this matter for precipitate action. The trial judge was obviously concerned that the jury's exposure to unadmitted photographs of the murder scene constituted a threat to the integrity of the trial proceedings. *See Gilliam*, 61 F.3d at 1085 (Niemeyer, J., dissenting). Forced to resolve what he termed a "dilemma," the judge invited argument from the litigants because, as he said, he "want[ed] to hear everybody fully on this issue before I make a decision." Although the defendants claim that the trial judge failed to consider their arguments, the record reflects otherwise. Defense counsel contested whether the jurors actually saw the photographs and suggested that they were properly identified. The judge considered these assertions but, after he consulted his own "detailed notes" and heard the jury foreman twice confirm that the jurors had viewed the photographs, he disagreed with the defense.[4] It is true that the judge prevented defense counsel from interrupting the judge's colloquy with the jury foreman, but this action was hardly unreasonable. Finally, once the judge knew that the jury had reviewed the unadmitted photographs, it was within his discretion to conclude that the available remedies could not retrospectively correct the problem; recalling a witness or issuing a curative instruction always runs a risk, as the judge noted, of compounding the difficulty by calling special

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[4] The judge asked the jury foreman: "To your knowledge, had all of those photographs been circulated through the jury?" The foreman replied, "Yes, sir. To my knowledge they all had." The judge then asked again whether the jurors had looked at all the photographs, and the foreman replied, "Yes, sir. As far as I know."

attention to the earlier error or distorting the significance of particular items of evidence.

The trial judge was also rightly concerned that defense counsel was responsible for the jury's exposure to these photographs. Although there is no "mechanical formula by which to judge the propriety of declaring a mistrial," *Somerville*, 410 U.S. at 462, many courts have recognized that a variety of defense errors that provoke a mistrial should not bar a retrial even though the defendant objects to the mistrial. *United States v. Simonetti*, 998 F.2d 39, 42 (1st Cir. 1993) (defense attorney's conflict of interest in representing defendant created manifest necessity for mistrial); *Thomas v. Municipal Court of Antelope Valley J.D.*, 878 F.2d 285, 290 (9th Cir. 1989) (defendant's failure to waive conflict of interest created manifest necessity for mistrial); *United States v. Shaw*, 829 F.2d 714, 719-20 (9th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) (defense counsel's opening remarks that potentially provoked juror bias created manifest necessity for mistrial); *Abdi*, 744 F.2d at 1502-04 (defense counsel's improper cross-examination of prosecution witness created manifest necessity for mistrial); *United States v. Willis*, 647 F.2d 54, 59 (9th Cir. 1981) (defendant's failure to appear for trial created manifest necessity for mistrial). The reason for treating defense error that provokes a mistrial in this manner is clear. In such situations, a trial judge may understandably be concerned that the defense is seeking either to gain the benefit of the error, or to provoke the

declaration of a mistrial in the hope of barring reprosecution. *See Arizona*, 434 U.S. at 512-13.[5]

Again: the trial judge was faced with nothing less than a threat to the integrity of trial proceedings. As he said: "The twelve jurors had seen and touched physical evidence not properly admitted." The judge's mistrial declaration responded to this breach of the evidentiary admissions process – A process that ensures a proper foundation for the introduction of evidence and provides notice to all trial participants and appellate courts of what is appropriately before the ultimate trier of fact. And it was defense counsel that compromised the evidentiary process. The judge here sought to do no more than gain control of his courtroom; a trial judge should not be placed in the position of having to make a formal finding of attorney bad faith or initiate sanctions or contempt proceedings in order to have his decisions sustained. It was enough for the court not to countenance a trial where important evidence inexplicably made its way before the jury. It was sufficient to say what the trial judge said here: it "would be unfair, unjust and improper" to "reward

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[5] This is not to suggest, categorically, that prosecutorial overreaching that leads to a mistrial is the only time retrial will be barred. *United States v. Jorn*, 400 U.S. 470, 485-86 (1971). But a reviewing court owes particular deference to a trial court's judgment on the necessity of a mistrial caused by defense error. *Jorn* does not suggest otherwise. There, defense counsel did not commit the error that led to the judge's *sua sponte* declaration of a mistrial, *id.*; rather, the decision "dealt with action by a trial judge that can fairly be described as erratic." *Somerville*, 410 U.S. at 469.

defendants by granting their Motion to Dismiss" the second prosecution.

It is no wonder that under these circumstances Chief Justice Rehnquist, considering the state's stay application as Circuit Justice, delivered what can only be described as a shot across our bow: "the trial court's judgment about the necessity [for a mistrial] is entitled to great deference, never more so than when the judgment is based on an evaluation of such factors as the admissibility of evidence, any prejudice caused by the introduction of such evidence, and the court's familiarity with the jurors." *Foster v. Gilliam*, 116 S.Ct. 1, 2 (1995) (Rehnquist, Circuit Justice) (citing *Arizona*, 434 U.S. at 513-14). With respect, I suggest that the majority has failed to heed what was plainly stated in the *Arizona* decision and plainly reinforced in the prior stay proceedings in this case.

This decision will reverberate far beyond the circumstances of this single case. The ability of state judges to declare mistrials in response to trial errors will be undermined. The strict scrutiny applied to the trial judge's decision here signals that habeas courts may appropriate for themselves the discretionary judgments normally reserved to state trial courts. The predictable result is that state judges will be forced to tolerate errors in their own proceedings, particularly those caused by the defense. *Arizona* itself warned against the dangers of such a development: "The interest in orderly, impartial procedure would be impaired if [the trial judge] were deterred from exercising [the power to declare mistrials] by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred." 434 U.S. at 513. The state trial bench may not

be willing to bear the costs now associated with the declaration of a mistrial: interruption of state criminal proceedings to permit months of collateral litigation on the propriety of the mistrial declaration; a stay of state proceedings; injunction of a state criminal trial; and, potentially, placing "the accused irrevocably beyond the reach of further prosecution." *United States v. Tateo*, 377 U.S. 463, 466 (1964). It bears repeating that there is a larger public interest in these proceedings – "the public's interest in fair trials designed to end in just judgments," *Wade*, 336 U.S. at 689 – one which is not served by windfall dismissals of a murder prosecution due to defense counsel's own mistake.

III.

It is no coincidence that Justice Hugo Black was at once a great advocate of incorporating the guarantees of the Bill of Rights against the states and the author of the *Younger v. Harris* decision. There is no contradiction in these dual positions. The state courts are obliged to respect federal constitutional guarantees, but the federal courts are equally obliged to respect state trial proceedings. For the reasons expressed above, I believe the majority has impaired the balance so essential to the proper functioning of our criminal justice system. It was this balance that Justice Black referred to as Our Federalism.

I would remand this case to the district court with directions to dismiss the petition.

Judge RUSSELL, Judge WIDENER, Judge NIEMEYER, and Judge LUTTIG join in this dissent.

NIEMEYER, Circuit Judge, dissenting:

I share Judge Wilkinson's and Judge Luttig's concern that the majority today "cut *Younger* at its core," *supra* at 55, by intervening in an ongoing criminal trial – where the state's interest in being free from federal intervention is at its zenith, *see infra* at 80 n.3 (describing "debacle that has ensued since our initial intrusion into the affairs of South Carolina"). As I expressed in my earlier dissent in this case, the majority's decision is "a bold affront to the principles of comity and federalism." *Gilliam v. Foster*, 61 F.3d 1070, 1084 (4th Cir. 1995) (en banc).

As important to my decision to dissent, however, is my belief that the majority opinion, by mechanically applying judicial formulations, has distorted the Double Jeopardy Clause's historically recognized protections. I would hold that absent any indication of prosecutorial misconduct or judicial overreaching on behalf of the prosecution, the Double Jeopardy Clause permits the state *one complete trial* to convict those it accuses of crime. While I agree with Judges Wilkinson and Luttig that "manifest necessity" existed for the state trial judge's decision to grant a mistrial, I do not agree with their suggestion that prejudice, to any extent, is required for finding "manifest necessity."

I

In this case, the state trial judge aborted petitioners' murder trial on its third day after discovering that the jury had, through defense counsel's neglect, viewed several photographs that had been neither offered nor admitted into evidence. The mistrial was in no way attributed

to any prosecutorial misconduct. Because he could not at the time guess whether either party would offer the photographs into evidence, the trial judge felt compelled to declare a mistrial to ensure a "fair and proper" trial.

At the threshold of their retrial, however, petitioners moved to dismiss the charges against them on double jeopardy grounds. The state trial judge denied petitioners' motion and the Supreme Court of South Carolina dismissed their appeal as interlocutory. On petition for the writ of habeas corpus, the federal district court refused to enjoin petitioners' second trial. But after a divided panel of this court affirmed, the full court, sitting en banc, directed the district court to grant an injunction and consider the merits of the habeas petition. *See Gilliam*, 61 F.3d at 1074. Reversing its field, the district court then granted the writ. This appeal followed.

Now, on rehearing en banc, the majority have voted to affirm the district court, concluding that the state trial judge abused his discretion in declaring the mistrial. By affirming the issuance of the habeas writ, the majority have (1) overruled the trial judge's discretionary rulings on evidence and the conduct of trial; (2) denied the State of South Carolina *one complete trial* of petitioners notwithstanding the absence of any prosecutorial or judicial misconduct; and (3) ordered released into the public three individuals accused of murder. I cannot agree that the Double Jeopardy Clause dictates such unseemly results.

II

The Supreme Court has recognized that the constitutional protection against being "twice put in jeopardy of

life or limb" for "the same offense," U.S. Const. amend. V, is "rooted in history" and "is not an evolving concept." *Gore v. United States*, 357 U.S. 386, 392 (1958). The Double Jeopardy Clause, as included in the Bill of Rights, was actually a redraft of James Madison's initial formulation – "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence. . . . " *Sources of Our Liberties* 422 (Richard L. Perry & John C. Cooper eds. 1991). But its framers intended for the Clause only to declare the law as it stood at the time and to guarantee the protections established by the common law. *See United States v. Jenkins*, 490 F.2d 868, 873 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975); Joseph Story, *Commentaries on the Constitution of the United States* § 930 (Roland D. Rotunda & John E. Nowak eds. 1987).

Those common law protections were well known. According to Blackstone, they emanated from four pleas in bar: *autrefois acquit* (former acquittal), *autrefois convict* (former conviction), *autrefois attaint* (former attainder), and pardon. 4 Sir William Blackstone, *Commentaries on the Laws of England* §§ 377-81. The Double Jeopardy Clause, therefore, shields defendants from multiple trials and multiple punishments for the same criminal offense. As a corollary, however, the state is entitled, absent misconduct by the prosecution or the trial judge on behalf of the prosecution, to one complete trial, and if the defendant is convicted, one punishment. *Cf. Illinois v. Somerville*, 410 U.S. 458, 463 (1973) ("[t]he interests of the public in seeing that a criminal prosecution proceed to verdict . . . need not be forsaken by the formulation or application of rigid [double jeopardy] rules").

Thus understood, the Double Jeopardy Clause serves its important purpose: to prevent "the State with all its resources and power [from] mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). But where defense counsel neglect precipitates a mistrial and there is no suggestion of prosecutorial misconduct or judicial overreaching in support of the prosecution's effort to convict, the concerns that underlie the Double Jeopardy Clause are not triggered.

Unfortunately, without finding any such prosecutorial or judicial misconduct in this case, the majority deny the South Carolina prosecutors *even one* complete trial to bring petitioners to justice. They do so by rigidly applying the "manifest necessity" principle and overlooking that principle's limitations. *See United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). In *Perez*, the defendant was subjected to a jury trial, but the jury was unable to agree on a verdict. In holding that the Double Jeopardy Clause did not bar a retrial, Justice Story stated, "[t]he prisoner has not been convicted or acquitted, and may again be put upon his defence." *Id.* He explained that courts may discharge juries from rendering verdicts when there is a "manifest necessity" for doing so "or the ends of public justice would otherwise be defeated." *Id.* And in allowing the defendant to be retried, the *Perez* Court deferred to the "sound discretion" of the trial judge. *Id.*

Yielding to trial judges' discretion in determining when "manifest necessity" exists remains the double jeopardy jurisprudence. *See Arizona v. Washington*, 434 U.S. 497, 514 (1978).

III

There is no allegation of misconduct by the prosecution or trial judge in the case *sub judice*. Indeed, defense counsel was responsible for creating the situation that caused the state judge to declare a mistrial in the interest of ensuring a "fair and proper" trial. Like a reprosecution after a hung jury, petitioners' retrial here would not implicate the interests that the Double Jeopardy Clause was historically designed to secure. I conclude, therefore, that the public interest demands and the Double Jeopardy Clause permits one complete trial for these three petitioners charged with murder.

I am authorized to say that Judge WIDENER joins in this opinion.

LUTTIG, Circuit Judge, dissenting:

The Chief Justice, in denying the State's belated stay application filed in August, admonished our court in language whose import is unmistakable, that under *Arizona v. Washington*, 434 U.S. 497 (1978), a trial court's determination of manifest necessity is *never* entitled to greater deference than where, as in this case, "the judgment is based on an evaluation of such factors as the admissibility of evidence, any prejudice caused by the introduction of such evidence, and the trial court's familiarity with the jurors." *Foster v. Gilliam*, 116 S.Ct. 1, 2,

(1995) (Rehnquist, Circuit Justice). This admonition, of course, was merely a reaffirmation of Justice Stevens' observation on behalf of the full Court in *Arizona*, 434 U.S. at 513-14 & n.33 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 687 (1949) (emphasis added), that,

> [t]here are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more 'conversant with the factors relevant to the determination' than any reviewing court possibly can be.
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> . . .
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> These considerations must be *at least as weighty* where a federal court, in considering a state prisoner's collateral challenge to his conviction on the ground that it violated the Double Jeopardy Clause, reviews the determination of a state trial judge as to juror bias.

See Foster v. Gilliam, 116 S. Ct. at 2 (citing *Arizona*, 434 U.S. at 513-14).[1] In confident disregard of the Chief Justice and the Court – indeed, without even a mention of the Chief

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[1] As Justice Marshall explained in *Holtzman v. Schlesinger*, 414 U.S. 1304, 1313 (1973), when a single Justice sits in his capacity as a Circuit Justice, he does not act alone, but rather "as a surrogate for the entire Court, from whence [his] ultimate authority . . . derives."

Justice's admonition – the majority today completes the wholesale substitution of its judgment for that of the state trial judge, on what the Chief Justice pointedly explained is the quintessential discretionary matter of whether the jury was potentially prejudiced by viewing the unadmitted crime scene photographs placed before it by defense counsel.

I.

The majority, as an appellate court in habeas, has literally sat down with some 26 individual photographs of the crime scene, compared them one with another, and without any familiarity with the evidence in the case, any understanding of the jurors, or any knowledge of either the prosecutorial or defense trial strategies, found as a matter of fact that the unadmitted photographs seen by the jury were not unduly prejudicial. This, despite a contrary finding by both the state trial judge, who knew the jury and the evidence, and the federal district court (before it was instructed by the *en banc* court to find otherwise),[2] and despite the express and repeated

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[2] The district court had no choice but to abandon its firmly-held views in light of our first *en banc* opinion, which reads as an undisguised mandate to the district court to reach the conclusions that the *en banc* majority had reached on appeal:

> It cannot be seriously disputed that the ongoing state criminal proceedings violate Petitioner's constitutional right not to be placed twice in jeopardy for the same offense. . . . The undisputed facts demonstrate that the state trial judge acted without any rational justification in granting a mistrial. . . . [T]he federalism concerns expressed in *Younger v.*

concession of prejudice *even by defense counsel*. The extent to which the majority has completely usurped the role of the state trial court, *see Arizona*, 434 U.S. at 513-14, is apparent throughout its opinion, but perhaps is illustrated best in the following passages, which constitute the essential reasoning underlying its finding that no prejudice arose by virtue of the jury having seen the unadmitted crime scene photographs:

> The photographs referred to as Set 2 included Exhibits 8, 12, 13, 14, and 16. The photographs referred to as Set 1 – Exhibits 9, 10, 11, 15, 17, 18, and 19 – were not offered into evidence.

> *Harris* . . . do not counsel against the grant of relief under these circumstances.

Gilliam v. Foster, 61 F.3d 1070, 1074 (4th Cir. 1995) (*en banc*).

Prior to our first *en banc* opinion, the federal district court had concluded that,

> the disputed photographs were more important than might first appear. . . . [I]ssues of provocation and self-defense are present in this case. One factor that is important in resolving these issues is whether one of the Defendants was on the decedent's property or on the public roadway at the time he fired his weapon. The disputed photographs are close up photographs of the ground which show blood stains. Because of this, they could be used to more clearly document where the shooting occurred.
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> . . .
>
> [T]he court . . . concludes that the Petitioners have *virtually no likelihood of success on the merits* of their double jeopardy claim. . . .

J.A. at 211, 213 (emphasis added).

A description of these photographs and a comparison of the photographs included in Set 1 vis-a-vis those in Set 2 is instructive. The photographs in Set 2, with the exception of Exhibit 16, are identical in every material aspect and show the area outside the Silvers' mobile home. Each of these photographs was taken from near Highway 32, the public roadway in front of the Silvers' mobile home, from the left-hand side of the mobile home and looking down the driveway toward it. The mobile home and the adjacent yard and driveway are shown in the background of these photographs, and all of them show the same three pieces of yellow tape in the foreground – the closest two pieces are circular in shape, one to the left and one to the right, and one strand of yellow tape is behind the two circular pieces and a few feet closer to the mobile home. The remaining photograph in Set 2, Exhibit 16, shows the same location, but reveals only the circular piece of tape to the right and one-half of the circular piece to the left.

. . .

Of the seven photographs in Set 1, four of them, Exhibits 10, 17, 18, and 19, are close-ups of the three pieces of yellow tape: Exhibit 10 shows a close-up of the circular piece of tape on the left of the photographs in Set 2; Exhibit 17 is a close-up of the two circular pieces of tape shown in photographs in Set 2; Exhibit 18 is a close-up of the strand of tape behind the two circles of yellow tape in the photographs in Set 2; and Exhibit 19 is a photograph of the circle of tape on the right in the photographs in Set 2. These photographs show red spots within or near the

areas marked with the yellow tape more clearly than the photographs in Set 2. Exhibit 15 is virtually identical to those in Set 2, taken from the same camera angle and depicting all three pieces of yellow tape. The two remaining photographs in Set 1, Exhibits 9 and 11, reveal the same three pieces of tape, but were taken from approximately the opposite location from those in Set 2; in other words, they are taken from near the mobile home facing up the driveway and toward Highway 32. These latter two photographs depict more clearly the same tire tracks shown in the photographs in Set 2.

. . .

. . . [T]here was no possibility that the jury could have been confused by seeing the photographs in Set 1 prior to having heard [Officer Counts'] testimony. Officer Counts had testified that yellow tape marked the three areas on the ground outside the Silvers' mobile home where what appeared to be blood was located. In addition, he had testified that these areas were located to the left of the mobile home and just beside the roadway, and he had marked the location of these areas on an overlay of a diagram of the crime scene prepared by the prosecution. Further, he testified that all of the photographs (Sets 1 and 2) showed the same scene but from different angles. Given this testimony, it strains credibility to suggest that the Set 1 photographs could have misled the jury into believing that there were a greater number of areas where blood was located or that the blood was discovered in a location other than the one indicated by Officer Counts.

. . .

> . . . [T]here is simply no rational argument that viewing the photographs in Set 1 somehow improperly biased the jury.
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> . . . [T]he photographs in Set 1 could not have adversely affected the impartiality of the jury; and in light of Officer Counts' testimony, the Set 1 photographs did not present any realistic potential for juror confusion.

Ante at 5-8, 27-28, 32. From these passages, the substance and detail of which do not appear in any state or federal opinion other than ours, it is evident that the majority's utter disregard of *Arizona* (and *Younger v. Harris*, 401 U.S. 37 (1971)), is no different from the Ninth Circuit's disregard of *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), in *United States v. Sanford*, 536 F.2d 871 (9th Cir.), *rev'd per curiam*, 429 U.S. 14 (1976). And the ultimate disposition of this matter should be no different. The majority's error under *Arizona* and *Younger* is plain, and full review will reveal nothing more about the unadmitted photographs at issue and their potential to prejudice the jury than we know now. As in *Arizona*, the conclusion is inescapable – that only the trial court could possibly assess the potential impact of these photographs on the jury that sat in Newberry, South Carolina. Additionally, it would be difficult to imagine a case wherein the disruption to the state proceedings caused by a federal appellate court could be any greater.[3]

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[3] In the debacle that has ensued since our initial intrusion into the affairs of South Carolina, the original state trial judge recused himself because he was named as a defendant in this

II.

There are only two assertions in the entire majority opinion that, if they were not demonstrably wrong, might at least suggest that the disposition of this case is not directly controlled by *Arizona*.[4]

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matter, and the second state trial judge was forced to halt the trial four days into it – literally while a witness was on the stand. The chaos that we have created is exemplified in the revealing exchange before the district court that follows:

> THE COURT: Can you hold one second. I'm sorry. Let me say that during the last break I was faxed a new copy of an opinion by the Fourth Circuit. I don't want to give anybody heart attacks. A three/four dissenting opinion written by three other minority members of the court. Three other separate opinions. I didn't know if you seen them.
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> THE STATE: No, sir.
>
> THE COURT: I will have them copied for you so you will have them. Go ahead. *This is the first time I ever had the Fourth Circuit law being made as we progressed.*
>
> DEFENSE COUNSEL: I think this is a *first for all of us, judge.*

J.A. at 432-33 (emphasis added).

[4] None of the majority's other asserted bases for invalidating the trial court's judgment even remotely supports the majority's conclusion that the trial court abused its discretion. First, that Officer Counts had already laid an adequate foundation for admission of the unadmitted photographs, *see ante* at 24, 30-31, even if true, is irrelevant to the question of potential jury prejudice. Even assuming that a foundation already existed, the fact remains that Officer Counts' testimony was easily subject to impeachment based upon the Set 2 photographs alone; thus, as defense counsel has consistently argued, the Set 1 photographs were essential corroboration of Counts' testimony. To invoke the adage, the

A.

First, the majority states repeatedly that the trial court acted "precipitately," making no findings that would possibly support a mistrial:

> At no point did the state trial judge indicate that double jeopardy concerns were implicated by the grant of a mistrial. And, neither [did] the state trial judge indicate[ ] that the photographs were in any way prejudicial to the prosecution or the defense.
>
> The state trial judge did not make a finding of manifest necessity or a finding of prejudice. Indeed, he did not use the word "prejudice"

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pictures were worth a thousand of Officer Counts' words. Second, that the prosecution originally said, "no objection" when it mistakenly thought the unadmitted photographs were being offered into evidence, *see ante* at 5 n.4, is of no moment, as the majority itself seems to acknowledge, because the prosecution immediately thereafter withdrew that statement as "premature." J.A. at 60-61. Third, that the trial judge chose not to inquire further whether the jury had seen the unadmitted photographs in particular, *after* he had already recalled the jury foreman and been told that "all" of the photographs (including the unadmitted ones) had been "circulated through the jury," *see* J.A. at 38, 92-94, and confirmed this fact with the court reporter, J.A. at 93, was by no means irrational. Fourth, that the motion for mistrial may have been invited by the trial court, *see ante* at 28-29 is not supported by the record and is denied by defense counsel, J.A. at 87, 304; regardless, it is irrelevant because, as the federal district court observed, even if the mistrial was invited, "the standard for judging the grant of mistrial remains the same." J.A. at 498. And fifth, the fact that an error might not result in reversal of a conviction, *see ante* at 30-31, 33-34, is plainly not dispositive of whether that error was sufficiently prejudicial to support a mistrial.

> during this proceeding. Further, the state trial judge gave no hint of what prejudice might possibly exist such that a reviewing court could conclude that prejudice resulted from the jury's viewing the photographs in Set 1.
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> . . .
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> The state trial judge . . . made no finding that the impartiality of the jury had been, or may have been, affected by viewing the photographs in dispute.

Ante at 10 & n.6, 35-36. This assertion is possible only through artificially focusing upon the trial court's colloquy with counsel when the mistrial was granted, to the complete exclusion of the trial court's extensive explanation of the reasons it granted the mistrial, which appear in its subsequent opinion and order denying Defendants' Motion to Dismiss. *See* J.A. at 35-41.[5]

In that opinion and order, which I include as an appendix because it reflects the seriousness and thoroughness with which the mistrial motion was addressed,

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[5] *See Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991) (cited by the federal *habeas* court, J.A. at 491, as support for its authority to issue a subsequent written opinion explaining the reasons for its earlier grant of the writ of *habeas corpus*). *Cf. Arizona* 434 U.S. at 517 n.39 ("The Court of Appeals was concerned that the trial judge may [not] have . . . consider[ed] the possible impact of [the improper] comments on the impartiality of the jurors. We think this concern is unwarranted. . . . We are unwilling to assume that a judge, who otherwise acted responsibly and deliberately, simply neglected to consider one of the central issues presented by the mistrial motion and argued by the parties when he made his ruling.").

the trial court explained what the majority concedes was the court's reasoning at the time it granted the mistrial, *see ante* at 34-35 n.25, that it had been "grave[ly]" concerned about the "prejudicial occurrence" of the jury having reviewed unadmitted photographs of the murder scene. *Id.* at 30-31. The court identified the problem that it had confronted when it learned of this occurrence, namely, that it could not foresee whether the photographs, even if ultimately offered into evidence, would have been admitted under Fed. R. Evid. 403. J.A. at 36.[6] It then reminded the parties that the court had been so concerned that it had "brought [the dilemma] to the attention of the litigants for a hearing as to how best then to proceed," and "allowed all counsel in th[e] matter 'full opportunity to explain their positions'." *Id.* at 37-38. The court outlined the steps that it had taken to ensure that the jury had in fact reviewed the unadmitted crime scene photographs, including interrogating the jury foreman and the court reporter in open court. *Id.* at 37-38. And it emphasized that it had considered, as an alternative to a mistrial, a curative instruction, but concluded that such an instruction "would simply highlight and compound the error already existent." *Id.* at 38. As the court observed, "[t]his was not merely an opening statement by an adversary that could have been cured by any instruction of th[e] court." *Id.* at 39-40.

The court then noted that, although an explicit finding of manifest necessity is not required under *Arizona*, in the court's view an "implicit finding of manifest necessity

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[6] The State of South Carolina adopted Fed. R. Evid. 403 in *State v. Alexander*, 401 S.E.2d 146, 149 (S.C. 1991).

exist[ed]" in the court's expression of grave concern over the "origin of the prejudice as well as the extent of the publication [of the unadmitted photographs] to the jury." *Id.* at 39. Finally, the court pointed out that more than just "manifest necessity" had justified the mistrial, because to have granted the defendants' motion to dismiss would have been to "reward" them for their own negligent action in allowing the photographs to be seen by the jury. *Id.* at 40. In language that captures perfectly the rationale underlying the "special respect" that the Supreme Court has said must be accorded the trial courts in determinations such as these, the court concluded by saying that it would not "second guess" what "it [had] observed, heard and felt at the time of its . . . ruling." *Id.* at 40-41.

The majority's holding notwithstanding, *ante* at 31-32, this deliberate consideration by the trial court, which again, as the majority concedes, *ante* at 34-35 n.25, mirrors the deliberate consideration by the trial court at the time the mistrial was granted, is not even arguably "precipitous," "irrational," or "irresponsible," *see Arizona*, 434 U.S. at 514.

B.

The majority's second assertion is that the State's *only* argument of prejudice is that the Set 1 photographs had not been formally admitted and properly authenticated. *See ante* at 26-28, 24-26 n.19. Like its first assertion, this, too, is flatly wrong. The State does argue that the unadmitted photographs were not properly authenticated, but that is not its only, or even its principal, argument. The State has explained throughout these proceedings that

the unadmitted photographs differed from the admitted photographs and prejudiced the State in two significant ways.[7]

First, the unadmitted photographs are the only close-ups of the scene and the only photographs from which it is possible to discern the presence of blood or a blood-like substance.[8] And, as both parties concede, the presence or absence of blood at this precise location is central

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[7] To support the claim that the government conceded that the photographs had no "prejudicial" effect, the majority relies upon a statement by the prosecution made during argument before the panel on whether to stay the state court's order of retrial pending a further hearing before the federal district court. *See ante* at 14. But the majority omits the prosecution's later clarification during that argument in response to a followup question, that, by "prejudice," the prosecution meant "inflammatory"; thus, the prosecution explained that the photographs are not like "autopsy photographs," in that they were not likely to inflame the passions of the jury. The prosecution did not concede that their submission to the jury was not prejudicial, but rather, argued that they were "inherently prejudicial." Transcript of Oral Argument, July 15, 1995, at 49-50.

[8] It is now known that a serological test had been performed on the dots. The test confirmed that the dots were human blood, but no determination was made as to whose blood it was, a failing that could be significant in light of the testimony that another violent incident had occurred at the same location between two other people earlier that same day, J.A. at 622-23. The prosecution has represented to us that it did not know at the time that any such test had been performed. Most important, though, neither party disputes that the state trial judge did not know of the test. Of course, it is only the trial court's state of knowledge concerning the dots that is relevant to the question of whether it acted precipitously.

to the case, given the defenses of provocation and self-defense. The defense counsel candidly admitted that it was for this reason that the photographs were important to the defense. Second, the State has consistently maintained that the unadmitted photographs show more clearly than the admitted photographs, the tire tracks that are believed to have been made by Gilliam's truck, thus confirming whether the truck was on or off decedent's property at the time of the crime.

At oral argument before the panel on the original motion to stay the state trial, the State argued as follows:

> THE STATE: When I look at the [admitted] photographs, I do not see the stain [that appears to be blood – the unadmitted photographs did show this stain].
>
> . . .
>
> THE STATE: The presence of the stains might be relevant to the case because it would reveal the – who shot first and where they shot, to the extent that Mr. Gilliam was injured at the scene and shooting from the victim's area. Where he was bleeding and where blood would be located and the amount of blood would be located would assist in making a determination whether Mr. Gilliam had a duty to retreat, to act in self-defense, join in the self-defense of Mr. Swain's action. He may have been coming to his defense. And whether the . . . victim was securing his property, whether he had the ability to defend his habitat at the time from intruders. Those are both factual questions that the jury may have been presented with. . . .
>
> . . .

> THE STATE: . . . You see the rust area . . . in the [admitted] photographs, but the red spots [that appear to be blood] do not appear to show up in any of the other photographs from my study of the photographs.

Transcript of Oral Argument, July 15, 1995, at 9-10, 51.

Similarly, in its brief before the *en banc* court on the merits, the State argued,

> [a] review of the photographs reveals the existence of various "red dots." The Petitioners now concede that whether the blurs represented blood was a critical fact, although the testimony of Officer Counts was essentially that he lacked the knowledge or expertise to state that the "dots" were blood. Although the defense concedes that at the time of the trial it had not subjected the photographs to such a test, it still asserts that it was relevant as representing Gilliam's blood. Under the evidence presented at the time of the trial, the location of Gilliam at the time of the shooting was in dispute with some witnesses placing him in the yard of the deceased and others placing him on the roadway. Similarly the questioned photographs showing tire tracks not represented in the admitted photographs touched uniquely (and possibly confusingly) on the location of [Gilliam's] truck.

Appellants Br. at 34-35 (footnote omitted). And, at oral argument before the *en banc* court, the prosecution again explained the prejudice that resulted from the jury seeing the unadmitted photographs:

> THE STATE: . . . [Defense] [c]ounsel Price in the testimony before the State, in the *habeas*

> *corpus* hearing, testified that these photographs could lead to jury confusion. Betty Strom, the prosecutor, testified that they could lead to jury confusion because they reveal the red dots which are not revealed in the admitted photographs.
>
> . . .
>
> THE COURT: What is the taint now?
>
> THE STATE: The taint was that the jury got information that had never been revealed to them.
>
> . . .
>
> THE COURT: The photographs were little different, were they not?
>
> THE STATE: Yes, sir. They were very different.

Transcript of Oral Argument, September 26, 1995.

If there were any doubt about the potential prejudice of the unadmitted photographs, *defense counsels'* repeated, candid concessions lay it to rest; in fact, throughout these proceedings, the defense has quite articulately described the prejudice to the State. At the hearing before the federal district court, defense counsel testified as follows:

> A. [Defense counsel] The question is what is useful about the unadmitted photographs which was helpful to the defense, is that it?
>
> Q. [The State, cross-examining] Yes, sir.
>
> A. [Defense counsel] . . . [P]art of photo set one [the unadmitted photographs] is a close-up that shows a red substance that would appear to be blood.

Q. [The State] And it shows a number of spots, as you already conceded, that is not evident in any other photographs which were introduced; is that correct?

A. [Defense counsel] There are some red spots that are hard to see in admitted exhibit 12 of photo 2. . . . Clearly they are easier to see in the unadmitted number 10.

. . .

Q. [The State] If you didn't know [that the blood] was there . . . ?

A. [Defense counsel] It would be difficult to see the blood. . . .

. . .

A. [Defense counsel] I spent a lot of time with these getting ready for this trial. It could be argued that a jury would be confused if we had both sets. It could be argued that they would be confused if they had only one set.

. . .

Q. [The State] Why would [unadmitted] defendant's exhibit 9 be of use to the defense in this case?

A. [Defense counsel] Well, it would show for the purposes of the defense that there were tire tracks and why weren't they analyzed for purposes of argument.

. . .

A. [Defense counsel] [Unadmitted exhibit 15 would be relevant because] [i]t would depict the area of the driveway where the mud puddle is. There had been earlier testimony as to how close

this truck had driven up to the trailer. We can see these two trees that become landmarks in the testimony in the development of the crime scene.

Q. [The State] Why would that have been useful in the defense in this case . . . ?

A. [Defense counsel] The state's position was that the defendants had been on the property of the decedent and it was necessary to show exactly where the truck had parked. The way that was to be done was the blood that was coming from defendant Gilliam would be located in the area where he got in the truck.

. . .

A. [Defense counsel] . . . [T]he location of the truck is relevant. My client was standing behind the truck. She got into the truck when the parties fled the scene.

. . .

Q. [The State] . . . [Y]our statements about [unadmitted] exhibits 17, 18 and 19 are that they reveal the blood droppings that are not represented or evident in the other photographs; is that correct?

A. [Defense counsel] It shows them clearer and more precise than in the others.

. . .

A. [Defense counsel] There are some admitted photographs that it would be very difficult to see the red dots within the circle of the yellow tape, yes.

. . .

> Q. [The State] Then you concede that the blood like substance, if it was able to be seen from any of the photographs was only able to be seen in the admitted photographs in one photograph; is that correct?
>
> A. [Defense counsel] On the copies that I am looking at, I have trouble finding it in other than one.

J.A. at 324-34.

Likewise, at oral argument before the *en banc* court, defense counsel explained:

> THE COURT: Then tell me how the introduction of those photographs were intended by you to influence the jury to acquit your defendants.
>
> DEFENSE COUNSEL: Those photographs were to corroborate the testimony of [Officer Counts] when he came down here and drew on this diagram in front of the jury and showed them where the blood was found. That's relevant as to where Mr. Gilliam was when he was shot.
>
> . . .
>
> THE COURT: Without the corroboration, your case was not as strong. The degree to which, we don't need to decide. It was not as strong.
>
> DEFENSE COUNSEL: Certainly, the corroboration strengthens our case.
>
> THE COURT: And thereby prejudices to some extent the government's case.
>
> . . .

> DEFENSE COUNSEL: If you're using prejudice in the sense of does it support one side or the other.
>
> THE COURT: Well, of course.
>
> DEFENSE COUNSEL: Then all evidence is prejudicial to either side and in that sense I would say "yes, it was prejudicial," just as the photographs in sets two and three were. Just as all the evidence that the state introduced against us theoretically prejudiced our case.

Transcript of Oral Argument, September 26, 1995.

Indeed, in my view, no one examining the unadmitted Set 1 photographs and the admitted Set 2 photographs could fail to appreciate the enormous significance (or, at the very least, the enormous potential significance) of the Set 1 photographs, given that the precise location of Gilliam's truck and of Gilliam himself when he was shot in the foot by the decedent are central to, if not dispositive of, the defendants' guilt. As the defense concedes, the Set 1 photographs all but confirm the existence of tire tracks at the location, whereas it is difficult (if not impossible) to confirm from the Set 2 photographs that the same markings are in fact tire tracks. Most important, the Set 1 photographs all but confirm the presence of a significant amount of blood (or a blood-like substance) at the location depicted in the photographs, whereas it is virtually impossible to infer even the presence of blood, much less a large quantity of blood, from the Set 2 photographs. In sum, the Set 1 photographs are not "just" close-ups of the same area depicted in the Set 2 photographs, as the majority would have one believe; they are

the only photographs that depict the information that both parties agree is absolutely critical to the case.

Even the federal district court that granted the writ of *habeas corpus* that we are now reviewing specifically found that, although the photographs were not "unfairly prejudicial," they "may have been 'prejudicial' to the State in the sense that they may have supported the Defendants' defenses of self-defense or provocation." J.A. at 505. As that court explained when it initially denied the writ, and before we effectively directed it to hold otherwise,

> it is now apparent that the disputed photographs were more important than might first appear. From the argument of counsel at the hearing, the court was able to determine that the murder victim in this case had himself fired shots at one of the Defendants shortly before or contemporaneously with the shot by which he was killed. Therefore, issues of provocation and self-defense are present in this case. One factor that is important in resolving these issues is whether one of the Defendants was on the decedent's property or on the public roadway at the time he fired his weapon. The disputed photographs are close up photographs of the ground which show blood stains. Because of this, they could be used to more clearly document where the shooting occurred.

J.A. at 211; *see also supra* note 2.

Tellingly, even the majority must acknowledge the potential prejudice that inhered in the unadmitted photographs: "These photographs . . . were relevant [and] material. . . . These photographs show red spots within

the areas marked with the yellow tape more clearly than the photographs in Set 2. . . . [The Set 1] . . . photographs [also] depict more clearly the same tire tracks shown in the photographs in Set 2." *Ante* at 2-3, 7-8. Under *Arizona*, this concession of prejudice is all but dispositive. For *Arizona* did not turn, as the majority mistakenly believes, *see ante* at 21, 23, 24, 28, on the fact that the improper argument was "highly prejudicial," as the Court characterized it at one point, *see* 434 U.S. at 515. Rather, *Arizona* turned on whether the error gave rise to "possible juror bias," *see id.* at 512; *see also id.* at 502 n.10 (implying that "the probability of juror prejudice" is the relevant inquiry, not the "certainty of prejudice"); *id.* at 509 ("significant risk that a verdict may result from pressures"); *id.* at 511 ("may have affected") ("possible bias") ("likelihood that the impartiality . . . may have been affected"); *id.* at 512 ("possibility of bias") ("it is possible") ("perhaps") ("possibility of bias") ("tends to frustrate") ("create a risk"); *id.* at 513 ("risk of bias") ("possible juror bias").

Because the majority concedes prejudice, and thus *a fortiori* the possibility of jury bias, the only way it can avoid the conclusion that the trial court unquestionably acted within its discretion is by holding (as it does) that the state trial judge acted "irrationally" in not attempting to cure that prejudice. *Ante* at 32-34. In order to so hold, the majority creates out of whole cloth a distinction of *per se* legal significance between prejudice and "unfair" or "undue" prejudice (which it presumably imports from Fed. R. Evid. 403), *ante* at 11-12, 13, 16, 22-23, 23, 23 n.18, and then finds that the prejudice in this case was not "unfair" because the photographs, *in its opinion*, would

have been admissible, *ante* at 2, 13-14, 22-26, 27-28, 30-31, 32-35.[9] Of course, whether or not, as a technical matter, the photographs would have been admissible or admitted, is ultimately irrelevant.[10]

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[9] The majority's conclusion that the photographs would have been admissible in the state trial is based in large part upon the forced speculation by the prosecution that, if the State had not objected to their admission, the photographs would have been admissible. *Ante* at 13-14, 22-23, 33-34. However, as the state trial judge understood, J.A. 36-37, 93-94, admissibility of the photographs is irrelevant to the question of whether the trial judge abused his broad discretion. The only possibly relevant inquiry would be whether the photographs would have been actually admitted. Neither party is in a position to know, much less to "concede," this. The ultimate determination of whether particular evidence will be admitted rests with the trial judge and must be made with knowledge of how the trial has unfolded and how the evidence is to be used at the moment when it is offered.

[10] In any event, that the Supreme Court in *Arizona* assumed from the inadmissibility of the statement there in question both that the statement was improper and that it may have affected the jury's impartiality, 434 U.S. at 511, does not mean, contrary to the majority's belief, *ante* at 22-23, 28-29, that if evidence is admissible, then *ipso facto* it could not affect the impartiality of the jury. The *only* error alleged in *Arizona* was that the statement was inadmissible as a matter of law, *see* 434 U.S. at 499-500; respondent's argument in defense of the statement was that the evidence "was admissible as a matter of Arizona law, and therefore that the opening statement was proper." *Id.* at 511. Here, in contrast, there was a more fundamental and antecedent error – that the entire process by which evidence is allowed before the jury was corrupted, depriving the court of the opportunity even to consider the admissibility of the evidence at the appropriate time.

The relevant question is not whether the photographs would have been admissible, but rather, whether it was an abuse of discretion for the state trial court to decline to formally consider their admission *after they had already been seen by the jury*. Most assuredly, it was not.

The trial court had at least four obvious and sound reasons for declining to attempt this cure. First, the court was confronted with the distinct possibility that the jury had already formed impressions, if not drawn conclusions, from the photographs – not about some ancillary issue of little consequence, but about the critical issues of the precise locations where defendant Gilliam was shot and where his truck was parked. Given this distinct possibility, it was reasonable to decide that subsequent foundation testimony (itself an oxymoron) could not correct those unguided impressions, any more than a curative instruction could. Second, for reasons that will never be known, the defense apparently had made the tactical decision *not* to introduce the Set 1 photographs during Officer Counts' testimony, and the prosecution had no doubt relied upon that choice. Aware that the timing of the admission of evidence is critical to the force of that evidence, it was reasonable for the trial court to determine that it was an unacceptable alternative to require the admission of the photographs at a time when the defense had not intended to introduce them, and thereby to require the prosecution to respond to the photographs at a time when it would not otherwise have been required to respond. Third, it was reasonable for the trial court to conclude that recalling Officer Counts and considering the admission of the photographs after they had already been seen by the jury would only have highlighted their

importance, increasing the potential for prejudice. J.A. at 36-37, 39-40, 93-94. *But see ante* at 32, 32-33 & n.19, 35. And fourth, it was clearly within the trial court's discretion to conclude that defense counsel's unauthorized placement of these crime scene photographs before the jury, together with the earlier incident of possible defense misconduct, *see* discussion *infra* at 22-23 & n.14, had so far stripped the proceeding of any semblance of fairness that any attempted cure would have been meaningless.

For these reasons, the state trial court was no more *required* to attempt to cure the error by recalling Officer Counts and then ruling on the admissibility of the photographs (even though the majority might have done so if it were hearing the case), than the trial court in *Arizona* was required to give a curative instruction (even though other trial judges might have done so if they were hearing the case). 434 U.S. at 511.

III.

Once the majority's two misconceptions about the trial court and the prosecution are corrected, it is apparent that this case is squarely controlled by *Arizona* and that the ultimate disposition of the case should be a straightforward, unexceptionable application of that decision; indeed, the case for not disturbing the trial court is even stronger here.

In *Arizona*, there was no allegation of prosecutorial misconduct. Here, too, there was no such allegation, and in fact, the federal district court expressly found that there was no prosecutorial misconduct whatsoever, J.A. at 498, a fact that *the majority ignores altogether.*

In *Arizona*, the trial error was caused by defense counsel. 434 U.S. at 510. Here, too, *and also ignored by the majority*, defense counsel caused the error – as the defense concedes and the state trial court expressly found. J.A. at 36, 89, 497.

In *Arizona*, the improper argument "*may* have affected the impartiality of the jury." 434 U.S. at 511 (emphasis added). Here, too, the unadmitted crime scene photographs at the very least "may have affected" the jury's impartiality. *See* J.A. at 38.

In *Arizona*, the improper argument "create[d] a risk, often not present in the individual juror bias situation, that the entire panel may [have been] tainted." 434 U.S. at 512. Here, too, because the crime scene photographs were given to the entire jury, the risk was that the entire panel became biased by the photographs. J.A. at 38, 94.

In *Arizona*, the trial court heard argument from both sides before granting the mistrial. 434 U.S. at 515-16. Here, too, the trial court "allowed all counsel in this matter 'full opportunity to explain their positions.' "[11] J.A. at 38.

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[11] In *Arizona*, the trial court delayed granting the mistrial for a day to allow defense counsel the extra time it had requested to conduct legal research on the mistrial, 434 U.S. at 514 n.34. Here, "[a]t no time did any counsel for the defendants ask for more opportunity to be heard or to review other legal precedent prior to the Court's ruling." J.A. at 39. However, the judge first conducted a bench conference about the matter and recessed court in order to give counsel for the parties an opportunity to conference and discuss the matter. J.A. at 90-91, 303. Thus, the majority's attempt to disparage the opportunity for counsel to be heard on the matter, *ante* at 27 n.21, rings hollow. *See Sumner v. Mata*, 449 U.S. 539, 546-48 (1981).

In *Arizona*, the trial court considered a curative instruction, but rejected such an instruction as inadequate to cure the improper comment. 434 U.S. at 511, 514 n.34. Here, too, the trial court considered a curative instruction, but concluded that such an instruction could not cure the effect of the jury having seen the unadmitted photographs. J.A. at 38.

And in *Arizona*, the defendants did not "attempt to demonstrate specific prejudice from the mistrial ruling, other than the harm which always accompanies retrial." 434 U.S. at 516 n. 35. Here, too, the only harm that the defendants allege is that "which always accompanies retrial." *See ante* at 36.

In fact, the reasons for reversing the *en banc* court here (and affirming the state trial court's judgment) are even more compelling than they were in *Arizona*.

In *Arizona*, the trial court failed to articulate the reasons for declaring the mistrial. 434 U.S. at 516-17.[12]

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[12] The Ninth Circuit, which was reversed by the Supreme Court in *Arizona*, described the Arizona trial court as having made "no findings whatsoever." 546 F.2d 829, 832 (9th Cir.), *rev'd* 434 U.S. 497 (1977). According to the court of appeals, the trial judge,

> at no time . . . indicate[d] the reason(s) why he granted the mistrial. Furthermore, his short order . . . is not susceptible to any inference that will fill this void. In the absence of any finding by the trial court or any indication that the court considered the efficacy of alternatives such as an appropriate curative instruction to the jury, we must conclude that neither of the tests of *Perez* . . . has been met.

Here, the trial court did articulate its reasons for declaring the mistrial. J.A. at 35-41, 93-94.

In *Arizona*, there was no explicit finding of manifest necessity. 434 U.S. at 516. Here, the trial court found manifest necessity. J.A. at 39.[13]

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[13] As the trial court noted, J.A. at 39, *Arizona* does not even require that it make an explicit finding of manifest necessity. 434 U.S. at 517. Indeed, a fundamental error of the majority is that it has fixed upon the mantra of "manifest necessity" while failing to realize that none of the concerns that underlie the actual constitutional prohibition against double jeopardy are implicated in this case. As the Supreme Court explained long before *Arizona*, "[t]he double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is *no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.*" *Wade*, 336 U.S. at 688-89 (emphasis added). *Cf. Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) ("The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' " (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)); *Stone v. Powell*, 428 U.S. 465, 479, 481-82, 490-91 (1976) (' "[T]he exclusion of illegally seized evidence [pursuant to *Mapp v. Ohio*, 367 U.S. 643 (1961)] is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers.' " (quoting *Kaufman v. United States*, 394 U.S. 217, 224 (1969)).

The primary evil that "manifest necessity" was created to prevent – the threat of the State bringing its awesome power repeatedly to bear in an effort to convict a criminal defendant, *see Arizona*, 434 U.S. at 507-08 & n.23, – is simply not present here. The mistrial was prompted solely by the negligence of the defense; there is no allegation either of prosecutorial misconduct or of pretext in the motion for mistrial. *See generally*

In *Arizona*, the trial court made no explicit finding of prejudice. 434 U.S. at 517 n.39. Here, the trial court made an express finding of prejudice. J.A. at 38, 39.

In *Arizona*, there is no suggestion that the defense acknowledged the prejudice to the government's case. Here, the defense has consistently admitted that introduction of the photographs did prejudice the government's case. *See* J.A. at 324-34; Transcript of Oral Argument, September 26, 1995.

In *Arizona*, the error was an improper opening statement. Here, as the trial judge recognized, the jury had "not merely [heard] an opening statement by an adversary that could have been cured by any instruction of this Court," it "had seen and touched physical evidence not properly admitted." J.A. at 39-40.

In *Arizona*, defense counsel expressly argued for a curative instruction by the trial court. 434 U.S. at 514 n.34. Here, defense counsel never urged that a curative instruction be given, yet the trial court considered such an instruction *sua sponte*. J.A. at 87-94, 37-38.

Significantly, here, unlike in *Arizona*, there was evidence before the state trial court that permitted a conclusion that defense counsel was engaged in a *pattern* of misconduct during this very trial.[14]

Arizona, 434 U.S. at 506-10, 514-15 (describing the "spectrum" of scrutiny given declarations of mistrial and explaining that that scrutiny is far lower when there is no prosecutorial misconduct).

[14] The prosecution explained as follows an event that occurred prior to defense counsel's placing the unadmitted photographs before the jury:

And finally, here, unlike in *Arizona*, the federal courts stopped an ongoing state murder trial – literally with a witness on the stand – on the basis of their assessment of

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> Earlier in the trial an incident had occurred where it was brought to the court's attention at a bench conference that an officer, I believe it was Major Gonza Hunter, brought to my attention that he had seen [defense counsel] looking in our notebook during one of the breaks. As opposed to announcing that in open court, I simply brought that to the court's attention with counsel at the bench. My recollection of that conference was that I brought it to the court's attention. [Defense counsel] stated to the court that she had in fact looked in our notebook, that she had done it in an attempt to find her own notebook. I pointed out to the court that I felt that a little extreme concerning the notebook she looked into had a large gold South Carolina Law Enforcement Officers Association seal on it. That was one of the first incidents that we had.

J.A. at 384-85. Before the federal district court, the prosecution stated that this incident was "a motivating factor" in its motion for mistrial, J.A. at 423-24, and, when asked for its views of why the mistrial was declared, explained that,

> [i]t seems to me that the reason for that was [Judge Johnson's] concern for what had happened, vis-a-vis two incidents. The first one involving Ms. Goodwin. I don't know what was said at the bench conference. I did not go there. The second matter was the business about the impropriety of photographs being not just admitted to the jury but picked up and handled by every member of the jury. *Those two things I think said to Judge Johnson that this was some sort of a pattern and his concern for what had happened had reached* –

Before counsel could complete his thought, Ms. Goodwin interrupted him:

the evidentiary significance of the crime scene photographs, in open defiance of the principles that lie at the core of *Younger v. Harris*.

That the state trial court in this case evidenced the grave concern that it did, J.A. at 36-40, 90-94, and in response, allowed counsel for both parties to argue their positions as to whether a mistrial should be granted, J.A. at 38-39, 90-91, 93, is probably alone sufficient to render the trial court's grant of a mistrial an exercise of "sound discretion," as it was for the Supreme Court in *Arizona*:

> [E]vincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are *therefore* persuaded by the record that the trial judge acted responsibly and deliberately. . . .

434 U.S. at 515-16 (emphasis added).

Given the deliberate, conscientious manner in which the court in this case determined to grant the mistrial – as evidenced by the attached detailed trial court opinion reciting the court's contemporaneous reasoning – there can be no question that the state trial court's judgment is

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> Your Honor, I object to Mr. Delgado saying what was in Judge Johnson's mind, that it is not reflected in this record. I move to strike all of what he thinks Judge Johnson was thinking.

J.A. at 428-29 (emphasis added). Because the witness "moved on," there was no occasion for the court to rule on the motion to strike.

entitled *at least* to the same "special respect" accorded the state trial court's ruling in *Arizona*, which read *in full*:

> Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted.

Quoted in Arizona v. Washington, 546 F.2d 829, 831 (9th Cir.), *rev'd*, 434 U.S. 497 (1977); *see also* Joint Appendix, *Arizona v. Washington*, U.S. Supreme Court, No. 76-1168 at 271-72 (1977).

* * *

Arizona was written precisely to prevent our trial courts, who are "far more 'conversant with the factors relevant to the determination' [of potential jury bias] than any reviewing court can possibly be," 434 U.S. at 514, from being second-guessed by appellate courts engaged in the kind of rank speculation that the majority engages in today. If *Arizona* means anything at all, it must mean that a federal appellate court in *habeas* should never find itself in the posture of comparing and contrasting individual crime scene photographs wrongfully placed before a jury by defense counsel and determining *de novo* whether those photographs might have been admitted and whether they might have somehow prejudiced the jury in a trial about which the appellate court knows little to nothing. As the majority so ironically, if not presciently, assures, "[i]f counsel were to air evidence that might tend to improperly bias the jury or adversely affect its impartiality, any reviewing court applying the teachings of *Arizona v. Washington* would conclude that the

trial judge acted within his discretion in granting a mistrial." *Ante* at 32.

Because, applying the teachings of *Arizona*, I believe that the majority is destined for reversal, if not summary reversal, I dissent.

Judges Russell, Widener, Wilkinson, and Niemeyer concur in this opinion.

APPENDIX

STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY The State vs. James Swain, Wayland Gilliam, Jr. and Pamela Owings, Defendants.	THE COURT OF GENERAL SESSIONS EIGHTH JUDICIAL CIRCUIT CASE NO.: AMENDED ORDER

This matter comes before me on the motion of attorneys for the three defendants captioned above, James Swain, Wayland Gilliam, Jr. and Pamela Owings. The Defendants have moved this Court pursuant to the prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution and Article 1, Section 12, of the South Carolina Constitution, to dismiss the charges pressed against them in the General Sessions Court of Newberry County. All three defendants are charged with Murder and Lynching in the First Degree. Additionally, Defendant Swain, alone, is charged with Assault with Intent to Kill, and Defendant Gilliam, alone, is charged with Indecent Exposure. All of these indictments arise out of the same factual setting. Indictment 93-GS-36-70 charges Murder, Lynching and Assault with Intent to Kill and Indictment 93-GS-36-183 charges Indecent Exposure. This Court held a hearing on Tuesday, April 11, 1995, wherein counsel for the defendants and the state were present and argued their respective positions in this matter.

It must be noted at the outset that the State moved for a mistrial only after this Court brought certain matters to the attention of the parties. More specifically, this Court observed that certain physical items, namely photographs of the murder scene, had been taken by the jury and reviewed by each of the jurors without these photographs being admitted into evidence. The Defendants' argument notwithstanding, it is of no consequence whether the Defendants either inadvertently, intentionally or mistakenly allowed this activity to occur. The principle remains the same: Exhibits that had not been introduced into evidence were in fact given to the jury for their review without proper documentation and prior to being finally passed on by this Court before being admitted into evidence.

The South Carolina Supreme Court in *State v. Alexander,* 303 S.C. 377, 401 S.E.2d 146 (1991) adopted Federal Rule of Evidence 403 which provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." This Court was never given the opportunity to make a determination pursuant to Rule 403 on the admissibility of the questioned photographs because of the actions of defense counsel. Counsel for one of the three defendants has acknowledged that it was possibly his action that allowed such an occurrence. "Now that was certainly sloppy housekeeping and I take responsibility for that, but that was certainly not a tactical move to put anything before the jury." (Transcript at Page 41). In the same way that a Motion *In Limine* does not ultimately

decide the admissibility of evidence because of changed circumstances occurring during a trial, *State v. Flood*, 295 S.C. 518, 369 S.E.2d 842 (1988), this Court could not foresee if the questioned photographs would have been offered and, if offered, then admitted into evidence. Contrast the Court's remarks on page 12 line 25 through page 13 line 4 with the Court's comments on page 46 lines 6-9 of the Transcript "And I don't know of anyway at this point in time, even if they were later offered and admitted, at this point in time I have no way of guessing that".

This Court is under an obligation to provide a fair and just trial for both the defendants and for the state. (See Transcript at page 46). This Court was left with the dilemma as to how to proceed after it was brought to its attention that evidence had been published to the jury that had not been properly admitted. It concerned this Court to the extent that it was brought to the attention of the litigants for a hearing as to how best then to proceed.

The Defendants argue that this Court did not consider any other reasonable alternative except to grant the State's Mistrial Motion after the publication to the jury of the questioned photographs. To the contrary, recognizing that the jury in this case had been empaneled for little over a day, the Court considered reasonable alternatives by calling out the jury foreman and inquiring with him in open court as to the extent of the publication of the questioned photographs. As noted on Transcript page 43 at line 9 the Court brought out the foreman of the jury, Mr. William C. Cunningham, and queried him as to what had been observed by himself as well as other members of the jury. Mr. Cunningham acknowledged that all the photographs had been circulated throughout the jury.

Mr. Cunningham: "Yes Sir, to my knowledge they all had."

The Court: "All right, Sir. To your knowledge, all of them had as far as you know?"

Mr. Cunningham: "Yes Sir. As far as I know."

The Court: "All right, Sir. That is what I needed to know. You can step back into the jury room."

Transcript page 44 lines 3 through 7.

Further, the Court then inquired of the court reporter whether or not the Court's understanding of the extent of the publicity was in fact accurate. (See Transcript at page 45). The court reporter confirmed by responding "Yes Sir. It was a big stack. Those were included in the group that were over there." (Transcript page 45, lines 4-5). It was the Court's feeling that because of the nature of the exhibits and the extent of the publication to the jury that no curative instruction could be issued. This Court's concern about a curative instruction is implicitly reflected in the Transcript at page 46 lines 6-9. Unlike the Court in *United States v. Sloan*, 36 F.3d 386 (4th Cir. 1994) a case cited by the defendants as supporting their position, this Court did consider the alternative of a curative instruction. It was this Court's decision at the time, however, that a curative instruction would simply highlight and compound the error already existent.

The Court did not engage in any *sua sponte* determination of a mistrial, *see State v. Prince*, ___ S.C. ___, 301 S.E.2d 401 (1983) but rather, allowed all counsel in this matter "full opportunity to explain their positions". (Transcript page 45, lines 9-11). It was of grave concern to

this Court that this prejudicial occurrence had transpired and this Court wished to hear from each of defendants' counsel as to their feelings before ruling on the Motion for a Mistrial. See Transcript pages 39-41. At no time did any counsel for the defendants ask for more opportunity to be heard or to review other legal precedent prior to this Court's ruling.

"When a mistrial is declared over a criminal defendant's objection, retrial is permitted only when 'there is a manifest necessity for the act or the ends of public justice would otherwise be defeated.' " *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824) as cited in *United States v. Sloan, supra.* The *Sloan* court noted that this bedrock principle has been reiterated and followed consistently in the intervening 171 years. See, e.g., *Arizona v. Washington*, 434 U.S. 497, *Illinois v. Somerville*, 410 U.S. 458 (1973) and *United States v. Jorn*, 400 U.S. 470 (1971). As noted by the *Somerville* court, a trial judge has "broad discretion" in determining whether manifest necessity requires declaration of a mistrial. While this Court "need not make an explicit finding of manifest necessity" *Sloan, id.* at 394, citing *Arizona v. Washington, id.*, the transcript adequately reflects that the court was so concerned with the origin of the prejudice as well as the extent of the publication to the jury that an implicit finding of manifest necessity exists. A "manifest necessity" standard cannot be "applied mechanically" *Jorn*, 400 U.S. at 487 and this Court declines to conclude that it acted "irrationally or irresponsibly", *Arizona v. Washington*, 434 U.S. at 514, in making its decision to grant a mistrial. "Each case must turn on its facts", *United States v. Sartori*, 730 F.2d 973, 976 (4th Cir. 1984).

The twelve jurors had seen and touched physical evidence not properly admitted. While the defendants claim the photographs would have been introduced later, this is speculative and conjectural. This was not merely an opening statement by an adversary that could have been cured by any instruction of this Court as was the case in *United States v. Sloan, id.* Moreover, Defendants have not produced a case where a mistrial was declared improvidently granted when inadmissible evidence by the way of photographs had been published to the jury.

Moreover, it is more than "manifest necessity" which requires the granting of a mistrial in this case. The public interest in and its right to a fair trial that is designed to end in a just judgment further requires that this Court deny the Defendants' Motion to Dismiss under the Fifth Amendment. It would be unfair, unjust and improper under these circumstances, which may have come about as a direct result of actions of defense counsel, to reward the defendants by granting their Motion to Dismiss. "The interest of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest" *Illinois v. Somerville,* 410 U.S. at 463, 93 S.C. at 1070. The Court's broad discretion was exercised under the facts existent and a mistrial was, of necessity, declared.

"Where for reasons deemed compelling by the trial judge, who is best situated intelligentiy to make such a decision, the ends of substantial justice cannot be obtained without discontinuing a trial, a mistrial may be declared without the defendant's consent and even over

his objection, and he may be retried consistently with the Fifth Amendment." *State v. Gamble*, ___ S.C. ___, 272 S.E.2d 796 (1980) quoting *Gori v. United States*, 367 U.S. 364, 368, 81 S.C. 1523, 1526, 6 L.Ed.2d 901 (1961). This Court will not second guess itself now, four months later, by what it observed, heard and felt at the time of its initial ruling. The Defendants' Motion to Dismiss the Indictments and to prosecution on the ground of double jeopardy is denied.

AND IT IS SO ORDERED.

/S/

James W. Johnson, Jr.
Judge - Eighth Judicial Circuit

Laurens, South Carolina
May 15, 1995

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Wayland Gilliam, Jr., James Matthew Swain, and Pamela Owings, Petitioners, v. James Lee Foster, Sheriff of Newberry County, Charles M. Condon, Attorney General of South Carolina, and James W. Johnson, Jr., Circuit Court Judge of South Carolina, Respondents.	) C/A Nos.:	2:95-1742-17AJ 2:95-1743-17AJ 2:95-1744-17AJ

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING WRIT OF HABEAS CORPUS

(Filed July 28, 1995)

This is an action for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, on the ground that the state of South Carolina is seeking to force the Petitioners to a second trial in violation of their right not to be placed in jeopardy twice as guaranteed by the Fifth Amendment to the United States Constitution. Contemporaneously with the filing of the petition for a writ of habeas corpus, the

Petitioners sought a preliminary injunction from this court to stay the second trial, which was then scheduled to begin on July 17, 1995.

In accordance with the local rules for this district, the habeas corpus petition and the motion for injunctive relief were referred to a United States Magistrate Judge. Because of the approaching trial, and in the interest of time, the Magistrate Judge did not conduct a hearing on the motion, but rather issued a Report and Recommendation suggesting that a temporary injunction should issue, which would delay the trial until this court could conduct a full evidentiary hearing on the merits of the habeas corpus petition. The Report and Recommendation was filed with the court on July 7, 1995, ten days before the second trial was scheduled to begin. The Respondents immediately filed objections to the Report and Recommendation, and the court heard oral arguments on the objections on the next business day, July 10. Late in the day on July 10, the court overruled the Magistrate Judge's Report and Recommendation and denied the request for injunctive relief.

The Petitioners then took an emergency appeal to the United States Court of Appeals for the Fourth Circuit. A three-judge panel of the Court of Appeals heard oral argument on the appeal on Saturday, July 15 and thereafter entered an order affirming this court's decision not to grant an injunction delaying the trial. The vote to affirm this court's decision on the request for injunctive relief was two to one.

The following Monday, July 17, the trial began as scheduled. While the trial was in progress, the Petitioners

sought emergency review of the panel decision before the entire United States Court of Appeals for the Fourth Circuit. On Thursday, July 20, the *en banc* court, by an eight-to-five vote, reversed the panel and entered a temporary restraining order enjoining the state criminal proceedings until this court could rule on the merits of the habeas corpus petition. The matter was remanded to this court to receive evidence and rule on the merits of the habeas petition "as expeditiously as possible."

On the afternoon of July 20, both the state trial judge and this court were informed of the developments in the Fourth Circuit. The state circuit judge stayed the trial and sequestered the jury so that the parties could return to this court for a full evidentiary hearing. The evidentiary hearing began the next day. Friday, July 21, at 3:00 p.m. Because of the emergency nature of the hearing, the court worked through the dinner hour and concluded the hearing shortly before 11:00 p.m. that evening. During the course of the hearing, the court received sworn testimony from seven witnesses and heard extensive argument from counsel. At the conclusion of the hearing, the court announced that the writ of habeas corpus would issue and entered on the record a brief summary of the reasons for the granting of the writ. At the time the court issued its oral order, the court announced that a full written opinion would follow, setting forth in detail its reasons for granting the relief sought by the Petitioners.

The following Monday, July 24, the court instructed the clerk to enter judgment reflecting that the writ was granted. On the same date, the court entered an order denying the Petitioners' request for release from the

terms and conditions of their state-court bonds pending an appeal of this court's decision to grant the writ.

On Tuesday, July 25, the Respondents filed a notice of appeal of this court's ruling granting the writ. Although the timely filing of the notice of the appeal has immediately transferred jurisdiction of all matters relating to the case from this court to the Court of Appeals, this court retains the authority, under Fourth Circuit precedent, to enter a written order memorializing the court's oral ruling of July 21. *See Grand Jury Proceeding Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991) (a district court has jurisdiction to enter a written order subsequent to an appeal of an earlier oral order because the written order "aids the appeal by giving [the Appellate Court] a written order to review").

After receiving the testimony, carefully considering all the evidence,[1] weighing the credibility of the witnesses, reviewing the transcripts, exhibits, and briefs, and studying the applicable law, this court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52. The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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[1] In finding the facts in this case, the court has relied upon the record produced at both the July 10 and the July 21 hearing.

I. FINDINGS OF FACT

The tragic events that underlie the state criminal charges in this case began when Hope Icard, the sister of Teresa Silvers, allegedly became involved in an altercation with Christie Gilliam, the sister of one of the Petitioners, Wayland Gilliam, Jr. The altercation, in which Icard allegedly "beat up" Christie Gilliam, led to a deadly showdown outside of the Silvers' trailer during which Mrs. Silvers' husband Ernest Silvers, was shot and killed.

The evidence in the underlying state case revealed that sometime after the altercation between Ms. Icard and Ms. Gilliam, the three Petitioners, Wayland Gilliam, Jr., James Matthew Swain, and Pamela Owings, appeared outside of the Silvers trailer. Shortly thereafter Ernest Silvers returned home from work and the deadly confrontation ensued. Exactly what transpired is subject to dispute, but it is clear from the record that the participants on both sides of the controversy fired shots at each other.[2] Silvers was struck in the upper left chest by a single rifle blast. The shotgun that Silvers was holding discharged, wounding Gilliam in the foot. In addition, Mrs Silvers' son, David Bain, fired a rifle out of a window of the trailer.

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[2] Some of the disputed facts relating to the bitter feelings between the Silvers and Gilliam families and the events leading up to the fatal shooting were provided to the court by counsel at oral argument.

Gilliam, Swain, and Owings were thereafter all charged with murder[3] and lynching. In South Carolina, the act of lynching is defined, by statute, as an act of violence inflicted by a mob that results in death. S.C. Code Ann. § 16-3-210 (Law. Co-op).[4] Additionally, Swain was charged with assault with intent to kill, and Gilliam was charged with indecent exposure for allegedly exposing himself while he taunted the occupants of the Silvers trailer during the standoff before the shooting.

The Defendants were initially brought to trial in the Court of General Sessions for Newberry County on December 5, 1994. The state was represented by a Deputy Solicitor and by two private attorneys from Columbia who were retained by the Silvers family to assist the state in prosecuting the case. The three Defendants were represented by the same three attorneys who represent them in this proceedings.

On the third day of trial, the state called as a witness Charles Edward Counts, a former agent with the South Carolina Law Enforcement Division (SLED). Counts was one of the investigating agents at the scene of the crime and was in charge of marking and gathering evidence on the exterior of the trailer where the death occurred. During the course of his examination, Counts was asked

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[3] The allegations of the indictment contend that Swain committed murder and that Gilliam and Owings aided and abetted the murder.

[4] Specifically, section 16-3-210 provides: "Any act of violence inflicted by a mob upon the body of another person which results in the death of the person shall constitute the crime of lynching. . . . "

about a series of photographs of the scene outside of the trailer. It is undisputed that Counts either personally took these photographs or was present when they were taken by another SLED agent. Pursuant to a request by defense counsel, the state had previously provided the Defendants with a duplicate copy of all of the photographs taken by SLED on the night of the investigation.

On cross examination, Counts was asked by defense counsel if he found any blood on the ground outside of the trailer. He responded that it would be necessary for him to review the photographs in order to refresh his recollection. Accordingly, defense counsel handed Counts a group of seven SLED photographs (referred to by the parties to this litigation as Photo Set 1). These photographs had been marked for identification as Defendants' exhibits 9 and 11, which depict tire tracks, and 10, 15, 17, 18, and 19, which show what appear to be blood stains. While Counts was examining the photographs, one of the private attorneys assisting the prosecution stated "without objection," when he erroneously believed that defense counsel was moving the photographs into evidence. When the court inquired of defense counsel whether the photographs were actually being offered in evidence, counsel responded that they were not and that counsel was merely using the photographs to refresh the witness's recollection.

Counts went on to describe the photographs as showing a red substance that looked like blood, which was

circled with yellow crime-scene tape. The colloquy regarding these photographs was as follows:

> Q. Based on those photographs that you used to refresh your recollection, do you see such a photograph that would indicate that sighting of blood that was marked?
>
> A. Yes, sir. I could.
>
> Q. And if you could, hand us that. If you could flip through and find the photograph or photographs that would indicate that.
>
> A. Basically all of these is the same area where the blood was found. Just overall views of it.
>
> Q. I hand you what has been marked as Defendant's exhibits 16.8, 13, 12, and 14. Would it be your testimony that those shots mark the finding of blood but just from different angles?
>
> A. Yes, sir. I can't tell you that substance is in fact blood. I am not a serologist, but I can tell you that these were photographs that myself or Agent Gainey of SLED took, and the substance resembles blood, and these five photographs depict the same area adjacent to the trailer where we found substance that resembled blood.

During this colloquy Counts identified and discussed a second series of photographs, marked as Defendants' exhibit 16, 8, 13, 12, and 14, which depict blood and tire tracks. These photographs (referred to by the parties to this litigation as Photo Set 2) depict the same subject matter as Photo Set 1, although they are taken from different angles and different distances. Counts testified where the blood was found and indicated the location on

the Defendants' demonstrative diagram of the crime scene. Counts drew in three areas where blood was found and gave the distances of the stains from the road and the trailer. He also testified regarding the tire tracks. Photo Set 2 was subsequently admitted into evidence without objection during further cross examination of Counts by another defense attorney.

A third group of SLED photographs of the crime scene, Defendants; exhibits 20, 28-36, 44-46, and 49 (referred to as Photo Set 3) was also admitted into evidence without objection.

In summary, therefore, while Counts was on the witness stand, Counts authenticated all three sets of photographs. In addition, he reviewed and referred to all three sets during cross examination and relied upon all of the photographs in diagraming the scene of the homicide for the jury. Photo Sets 2 and 3 were formally offered into evidence; Photo Set 1 was not. At first, when it appeared that defense counsel was going to offer Photo Set 1 into evidence, the private attorney retained by the family to assist the Solicitor indicated that he had no objection to the photographs. When he subsequently learned that they were not being formally offered, he simply said that his actions were "premature."

At the conclusion of Counts' testimony, he was excused and the court recessed the trial for lunch. The court admonished the jury not to take with them into the jury room any of the photographs that had been introduced. The court also suggested to the prosecutors that they make sure Officer Counts did not accidentally walk out of the courtroom with any of the photographs.

When court resumed, the court reporter informed the judge that when she was gathering all the evidence at the lunch break, she retrieved a stack of photographs from the jury rail. Included in this stack was Photo Set 1, which had not been admitted into evidence. Photo Set 1 included the photographs of the blood stains and tire tracks that Counts had used to refresh his recollection. The court then called the problem to the attention of the attorneys and asked for any suggestions about how to remedy the situation. After discussing the matter among themselves, one of the prosecutors moved for a mistrial, stating, "what we have, your honor, is defense counsel has placed in the jury's – has placed something that is easily accessible, has been accessible by the jury, which is not in evidence and that is improper." [TR. 39].

All three Defendants objected to the mistrial motion and argued against the suggestion that it was one of the defense attorneys who had put Photo Set 1 on the jury rail. Counsel argued that Counts had identified and testified about the disputed photographs. Defense counsel even offered to recall Counts to formally move the photographs into evidence.

The court then called the jury foreman into the courtroom, directed his attention to the stack of photographs (which included Photo Set 1), and asked the foreman whether, to his knowledge, "all of those photographs had been circulated through the jury prior to the lunch break." The foreman indicated that they had. Defense counsel then suggested that the court inquire further of the foreman, because the photographs were all similar, and it was possible, according to defense counsel, that the foreman was simply mistaken about whether Photo Set 1

was included in the photographs viewed by the jury. The court declined to interview the foreman any further. The state then "strenuously" renewed its motion for a mistrial, and the court granted the motion "because it is clear that the photographs that were not in evidence, had not been testified to, had not been identified have been circulated to the jury. And I don't know of any way at this point in time, even if they were later offered and admitted, at this point in time I have no way of guessing" [TR. 46].

Defense counsel disagreed with the court's suggestion that the photographs had not been identified or testified about, asking the court to examine the matter further by having the court reporter read back Counts's testimony. The court declined to do so.

The jury in the first case was dismissed and the case was calendared for trial a second time beginning on July 17, 1995. In March, all Defendants filed a motion with the state court to dismiss the case based upon the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The same judge who had granted the mistrial conducted an evidentiary hearing on April 11, 1995. The judge denied the motion on May 15, 1995. In his order denying the motion, the judge implicitly, if not explicitly, found that it was defense counsel who erroneously placed Photo Set 1 on the jury rail. May 15, 1995 Order at 2 ("This court was never given the opportunity to make a determination pursuant to rule 403 on the admissibility of the questioned photographs because of the actions of defense counsel. Counsel for one of the three defendants has acknowledged that it was possibly

his action that allowed such an occurrence.").[5] This implicit finding that it was defense counsel who, perhaps through innocent mistake, caused Photo Set 1 to be commingled with the other photographs is entitled to a presumption of correctness under 28 U.S.C. § 2254(d), and there has been no persuasive evidence offered to overcome this presumption. The May 15 Order also suggests that the judge, at least subjectively, considered the possibility of a curative instruction,[6] but rejected this alternative because "a curative instruction would simply highlight and compound the error already existent." *Id.* at 4. The trial court's order denying the motion concluded that the jury had "seen and touched physical evidence not properly admitted," *id.* at 5, and that the court "could not foresee if the questioned photographs would have been offered and, if offered, then admitted into evidence." *Id.* at 3. Although the trial judge's order refers to a "prejudicial occurrence," the order does to identify the prejudice except to say that the photographs were not in evidence.

There is nothing in the record to indicate that the prosecutors acted with had faith or improper motive in moving for a mistrial, and this court specifically so finds.

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[5] In another portion of the order, the court expresses ambiguity over whether defense counsel caused the mix up. May 15, 1995 Order at 6 ("It would be unfair, unjust, and improper under these circumstances, which *may* have come about as a direct result of actions of defense counsel, to reward Defendants by granting their motion to dismiss.") (emphasis added).

[6] There is nothing in the transcript of the first trial indicating that the trial judge considered a curative instruction.

There was testimony before this court which might suggest that the prosecutors made their motion out of a genuine belief that the trial court desired to receive such a motion after having assiduously attempted to prevent a mixup prior to the lunch break only to find that one had apparently occurred. As will be seen below, whether the motion for a mistrial was invited by the trial judge or was raised by the prosecutors on their own initiative is of no moment here. The standard of review under the Constitution (i.e., whether there was a showing of a "manifest necessity" for a mistrial) remains the same.

What is clear, however, is that the state "strenuously" moved for a mistrial and the motion was strongly resisted by the Petitioners. Defense counsel suggested several alternatives, short of a mistrial, that the trial court could have employed to cure any error before the trial was aborted; however, the trial judge refused to explore all of the alternatives.

This court has carefully and meticulously examined Photo Sets 1, 2, and 3 and finds that they are all photographs of the same crime scene – taken from differing distances and angles – by a representative of the state that was prosecuting the case. The disputed photographs in Photo Set 1 were authenticated by Officer Counts, were used by him to refresh his recollection as to whether there were blood stains on the ground, and were actually relied upon by him in fashioning a demonstrative exhibit showing the location of what appeared to him to be blood stains, tire tracks, and other evidentiary items relating to the homicide.

The Petitioners attempted to appeal the denial of their double jeopardy motion to the South Carolina Supreme Court, but that court denied the appeal as interlocutory.

During the second trial, the Solicitor objected to Photo Set 1[7] being admitted into evidence. The Solicitor argued that the photographs would tend to paint a "confusing picture" to the jury. It was argued that submitting the additional SLED photographs to the jury would "muddy up" what, from the prosecution's perspective, was "a clear picture of what happened" and would "put before the jury [photographs] that did not address anything of specific evidentiary value." Later in his argument, the Solicitor suggested that, although the disputed photographs depict what appears to be blood, the substance was never analyzed and no witness was prepared to testify that it was blood.

After hearing extensive argument on the admissibility of Photo Set 1, the state judge assigned to try the case a second time[8] admitted the photographs into evidence.

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[7] The photographs comprising this set were renumbered for the second trial.

[8] The state judge who presided over the first trial and who denied the motion to dismiss the action on double jeopardy grounds recused himself from the case because he has been named as a Respondent in this action.

II. CONCLUSIONS OF LAW

A. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[9] U.S. Const. amend. V. Although this proscription appears to be relatively straightforward, the complexity of the myriad issues arising under the Double Jeopardy Clause has prompted then-Justice Rehnquist to remark: "[T]he decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981), *quoted in* William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S. L. Rev. 411, 412 (1993). This court takes comfort in knowing that the issues raised by the present habeas corpus petition are well-charted by the decisions of the United States Court of Appeals for the Fourth Circuit. *See, e.g., United States v. Ham*, No. 94-5507, ___ F.3d ___, 1995 WL 369605, *2-4 (4th Cir. June 20, 1995); *United States v. Sloan*, 36 F.3d 386, 393-95 (4th Cir. 1994); *United States v. Shafer*, 987 F.2d 1054, 1057-58 (4th Cir. 1993); *United States v. Council*, 973 F.2d 251, 253-56 (4th Cir. 1992); *United States v. Von Spivey*, 895 F.2d 176, 177-78 (4th Cir. 1990); *United States v. Sartori*, 730 F.2d 973, 975-76 (4th Cir. 1984); *Harris v. Young*, 607 F.2d 1081, 1084-87 (4th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

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[9] The Double Jeopardy Clause applies to state prosecutions through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

The Double Jeopardy Clause contains several different protections: " 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' " *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). In addition, as is particularly relevant to the issues presently before the court, the prohibition against double jeopardy generally protects a defendant from having to endure even the process of more than one trial on the same offense. *Id.* at 128 (citing *Arizona v. Washington*, 434 U.S. 497, 503 (1978)).

In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 35 (1978) (citing *Downum v. United States*, 372 U.S. 734 (1963)). Once jeopardy has attached, a defendant has a substantial constitutional right to have that particular tribunal decide his guilt or innocence. *Id.* at 35-36; *Washington*, 434 U.S. at 503; *United States v. Jorn*, 400 U.S. 470, 484-85 (1971). As explained by the United States Supreme Court,

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.

> Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Washington, 434 U.S. at 503-05 (footnotes omitted). Of course, in some instances a defendant's right to have his case decided by a particular jury may be outweighed by "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). The Supreme Court has attempted to reconcile these potentially conflicting interests by holding that a mistrial granted over the defendant's objection will prevent reprosecution of the defendant unless there was "manifest necessity" for the mistrial.[10] *Washington*, 434 U.S. at 505.

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[10] The now familiar "manifest necessity" standard originated in *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), in which the Supreme Court held that a trial which ended in a hung jury was not a legal bar to a subsequent prosecution. The Court stated:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

Id. at 580.

Although the *Perez* Court did not mention the Double Jeopardy Clause, its manifest-necessity standards has become the test for determining whether a retrial following a mistrial to which the defendant did not consent is barred by the Double Jeopardy Clause. *See* McAninch, *supra*, 44 S.C. L. Rev. at 477.

The "manifest necessity" standard is incapable of precise definition. At the Supreme Court stated in *Arizona v. Washington*, "those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." 434 U.S. at 506. Although the parameters of manifest necessity must be examined in light of the particular facts of each case, the decisions of the Supreme Court and the Fourth Circuit Court of Appeals provide substantial guidance in articulating the general principles of the manifest-necessity test.

First, the prosecution bears the burden of proving manifest necessity for the mistrial; and this burden is "a heavy one." *Id.* at 505. Although the phrase "manifest necessity" does not require absolute "necessity" as that word is generally defined, the prosecutor must demonstrate a " 'high degree' " of necessity before a mistrial will be deemed appropriate. *Id.* at 506. Exactly what constitutes a "high degree" of necessity sufficient to justify a mistrial will depend upon the particular circumstances that precipitated the mistrial in any given case. *Id.* at 507-08.

The *Washington* Court formulated a sliding scale of appellate scrutiny for determining whether a mistrial was warranted by manifest necessity, depending on the underlying reason for the mistrial. At one extreme are cases in which the prosecution requests a mistrial in bad faith. The Court stated that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a

tactical advantage over the accused." *Id.* at 508. At the other extreme are cases in which the jury has heard all of the evidence in the case, but is unable to reach a verdict because the jury is genuinely deadlocked. *Id.* at 509. In such a situation, the trial judge's decision to grant a mistrial "is accorded great deference by a reviewing court." *Id.* at 510. Between these two poles lies the full gamut of potential trial errors in which a trial judge must decide whether a mistrial is manifestly necessary. The trial judge's determination in such circumstances "is entitled to special respect," because he or she has the unique opportunity to observe the events in the full context of the trial and is therefore in the best position to evaluate potential juror bias. *Id.* at 513-14.

The deference afforded to a trial judge is not, however, unlimited. A reviewing court must determine whether the trial court's decision to grant the mistrial "reflects the exercise of sound discretion." *Harris v. Young*, 607 F.2d 1081, 1085 (4th Cir. 1979) (citing *Washington*, 434 U.S. at 514), *cert. denied*, 444 U.S. 1025 (1980). As the Fourth Circuit recently stated, "A judge cannot find that manifest necessity requires declaration of a mistrial 'until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.' " *United States v. Sloan*, 36 F.3d 386, 393-94 (4th Cir. 1994) (quoting *Jorn*, 400 U.S. at 485). Of course, a trial court's failure to make an explicit finding of "manifest necessity" before granting a mistrial is not necessarily fatal to a retrial as long as the record provides sufficient justification for the trial court's ruling. *Washington*, 434 U.S. at 516-17. Moreover, " '[e]ven if the trial judge believes in subjective

good faith that a mistrial is called for,' an appellate court 'must reverse if the record belies his concerns.' " *Sloan*, 36 F.3d at 400 (quoting *United States v. Meza-Soria*, 935 F.2d 166, 171 (9th Cir. 1991)).

One of the most significant factors in determining whether a mistrial is justified by manifest necessity is whether the trial judge adequately explored alternative measures, short of granting the mistrial, that were available to remedy the problem. *See Jorn*, 400 U.S. at 487. "If obvious and adequate alternatives to aborting the trial were disregarded, this suggests that the trial judge acted unjustifiably." *Harris v. Young*, 607 F.2d at 1085 n.4. Indeed, the Fourth Circuit Court of Appeals has stated,

> In order to determine if the mistrial was required by manifest necessity, the *critical* inquiry is whether less drastic alternatives were available. . . . If alternatives existed, then society's interest in "fair trials designed to end in just judgments" was not in conflict with the defendant's right to have the case submitted to the jury.

United States v. Shafer, 987 F.2d 1054, 1057 (4th Cir. 1993) (emphasis added) (quoting *Perez*, 22 U.S. (9 Wheat.) at 579-80) (other citation omitted); *see also Sloan* 36 F.3d at 394; *United States v. Von Spivey*, 895 F.2d 176, 178 (4th Cir. 1990); *United States v. Sartori*, 730 F.2d 973, 975-76 (4th Cir. 1984); *Harris*, 607 F.2d at 1085 & n.4.

Applying the foregoing principles to the facts of this case yields the conclusion that the trial judge's decision to declare a mistrial in the first prosecution of the Petitioners was not supported by manifest necessity. After

examining the record and hearing argument from counsel, the court cannot determine that the presentation of the disputed photographs to the jury when those photographs were not formally in evidence created a manifest necessity for a mistrial, especially given the nature of the photograph and the availability of less-drastic remedies to cure any prejudice caused by the photographs being presented to the jury.

First, the Respondents have not identified any characteristics of the photographs themselves that would make the jury's viewing of the disputed photographs unduly unfair to the prosecution. As noted previously, the subject photographs were generally of the same scenes as most of the photographs already admitted into evidence, but were taken from different angles or different distances than the other photographs. Moreover, they were taken by the state's own investigators. Apparently the only significant difference in the photographs in the disputed photo set is that some of them contain clearer images of what appear to be blood spots. The Respondents apparently conceded before the Court of Appeals that the photographs themselves were not inflammatory so as to bias the jury. In fact, when defense counsel initially presented the photographs to Officer Counts to refresh his recollection on cross examination, one of the privately-retained prosecutors said "without objection" when he erroneously thought that the Defendants were moving the photographs into evidence. The disputed photographs may have been "prejudicial" to the State in the sense that they may have supported the Defendants'

defenses of self-defense or provocation;[11] however, the photographs were not unfairly prejudicial so as to be inadmissible evidence.[12]

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[11] It should be remembered that Officer Counts used the disputed photographs, on cross examination by defense counsel, to refresh his recollection as to whether there appeared to be blood spots on the ground. He also used the photographs to indicate the location of the blood spots by marking them on a plastic overlay of a sketch of the crime scene. All of this was done without objection by the prosecution. Thus, the jury already had before it the defense version of where the participants stood at the time of the shooting, through Officer Counts's testimony and his markings on the diagram of the crime scene.

During the July 10 hearing, it appeared to the court that a critical issue in the underlying trial was where the participants stood and whether one of the alleged assailants was struck by gunfire. By the time of the second hearing on July 21, it became clearer that the jury had already been exposed to a diagram of the crime scene showing the apparent location of the Defendants at the time of the shooting. Therefore, the real issue to be decided by the jury was the more basic question of who fired the first shot. When the evidence is viewed in this context, the disputed photographs appear to be of no real significance to either party. This conclusion is buttressed by the facts that the Petitioners never formally offered the photographs into evidence and that the state expressly stated that it had no objection to the photographs when it erroneously thought they were begin offered into evidence.

[12] The disputed photographs were actually into evidence over the State's objection in the second trial. Obviously, this fact alone is no determinative of whether the photographs would have been admissible in the first trial had the Defendants formally moved for their admission at that time. The second trial was conducted by a different judge, and the photographs undoubtedly were introduced in a different content in the second trial than was presented in the first trial. Nevertheless,

The State argues that the jury's viewing the disputed photographs in the first trial was unfair because the State would have objected to the photographs as being cumulative. This argument is somewhat inconsistent. On one hand, the State argued that the photographs were cumulative because they were merely different angles of the same scenes portrayed in other photographs that were already in evidence. On the other hand, the State acknowledged that the disputed photo set contains several photographs in which the supposed blood spots were more clearly visible than in the photographs in evidence. In any event, a jury's erroneously viewing cumulative photographs would generally not cause the type of bias or prejudice necessary to justify a mistrial.

The State also argues that the mistrial was manifestly necessary because the jury's viewing the unadmitted photographs would likely cause confusion to the jury. The State argues that the photographs may cause the jury to erroneously assume that the red spots in the photographs are blood, when there was no foundational testimony from a serologist that the spots were, in fact, blood. The court cannot accept this argument. First, Officer Counts testified about the location of the red spots when he used the disputed photographs to refresh his recollection, and he stated that the spots appeared to him to be blood stains. Second, in laying a proper foundation for the photographs, the Defendants would not have to call a

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the fact that the photographs were admitted in the second trial demonstrates that the characteristics of the pictures themselves were not unfairly prejudicial.

serologist to establish that the red spots in the photograph were, in fact, blood.

Additionally, the State contends that the jury could be confused about the location of the blood spots portrayed in the disputed photographs if those photographs were seen by the jury without further testimony about them. However, as previously stated, the record indicates that Officer Counts testified about the location of the alleged blood spots in relation to the crime scene. In addition, he used the photographs to diagram the location of the blood spots on an overlay map of the crime scene.

Next, the Respondents argue that they were unfairly prejudiced when jury examined the unadmitted photographs because the Defendants might have been attempting to engage in a devious legal maneuver by trying to put evidence before the jury during the prosecution's case in chief, without formally offering the evidence, so as to preserve for themselves the right to make the last argument to the jury under South Carolina procedural law.[13] At the hearing on the Petitioners' motion for preliminary injunction, this court initially accepted this

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[13] In South Carolina criminal trials, a defendant who presents no evidence thereby acquires the right to open and close the arguments to the jury. *State v. Brishane*, 2 S.C.L. (2 Bay) 179 (1802); *State v. Rodgers*, 235 S.E.2d 808 (S.C. 1977). A defendant who has the right to open and close the arguments may waive the opening and simply reply to the prosecutor's argument. *State v. Garlington*, 72 S.E. 564 (S.C. 1911). Moreover, where several defendants are tried together, and only one offers any evidence, the state retains the right to open and close as to all. *State v. Huckie*, 22 S.C. 298 (1885).

argument in concluding that the Petitioners had shown virtually no likelihood of success on the merits of their habeas corpus claim. After due reflection, however, the court is constrained to reject its earlier embrace of the Respondents' "last argument" theory.

This argument was raised for the first time when the parties were before the court appealing the Magistrate Judge's Report and Recommendation. This theory was not suggested to the trial judge as a ground for the mistrial, and it was not argued in the papers filed with this court that were reviewed by the Magistrate Judge. In the hearing on the merits of the habeas petition, one of the prosecuting attorneys candidly admitted that the possible strategy of the Defendants in attempting to get the photographs before the jury without forfeiting their right to argue last to the jury was not even contemplated when the State moved for a mistrial. The Fourth Circuit Court of Appeals has expressed some doubt about whether a reviewing court should examine a ground for the mistrial that obviously was never presented to the trial judge. *See United States v. Sloan*, 36 F.3d at 397 ("[I]t is not at all clear that we need address a ground apparently not relied on, or even considered by, the [trial] court in declaring the mistrial. . . . "). Nevertheless, it is now clear that the "last argument" theory is completely without merit.

When the Respondents first raised this theory to the court in their objections to the Magistrate Judge's Report and Recommendation, the Petitioners vigorously denied that they had any motivation to attempt to place the photographs before the jury "through the back door" in an attempt to preserve their right to the last jury argument. They asserted that they had planned a spirited

defense and had provided the State with a lengthy list of witnesses that it intended to call. In any event, argued the Petitioners, they had already waived their right to argue last by introducing other evidence earlier in the prosecution's case in chief. Because the "last argument" theory was raised for the first time before this court, the Petitioners could not cite any authority to support its argument that under South Carolina law, a defendant who offers any evidence, whether during the State's case in chief or his own case, thereby waives the right to argue last.

The Respondents replied that at the time of the mistrial, it was impossible to determine what the Defendants' defense strategy would be. Also, the Respondents asserted that, in the solicitor's experience, the practice of some state judges is to afford the last argument to a defendant who introduces evidence on cross examination in the State's case, as long as the defendant does not introduce any evidence in the defendant's own case in chief. This judge's previous personal experience as an attorney who occasionally practiced criminal law in South Carolina was consistent with the solicitor's assertion that state circuit judges are inconsistent in their practices of affording criminal defendants the right to argue last.

On appeal, it became apparent that the Respondents' argument rested upon a flawed application of South Carolina law. As the majority opinion of the *en banc* court of appeals noted, under South Carolina law a defendant who offers *any* evidence in his behalf – even during cross examination of a prosecution witness – forfeits the right to open and close the summations. *State v. Gellis*, 155 S.E.

849, 855 (S.C. 1930); *State v. Battle*, 403 S.E.2d 331, 333 (S.C. Ct. App.), *cert. denied* (S.C. 1991). Furthermore, the majority opinion from the *en banc* court stated that the Respondents' argument "bordered on the spurious" and suggested that the Respondents "effectively abandoned" the argument on appeal.

When the parties returned to this court after remand, the Respondents asserted that they had not abandoned the argument, and they pressed it again before this court with full vigor. In the second hearing, the Respondents presented evidence to suggest that South Carolina trial judges sometimes do not properly follow the "last argument" rule enunciated by the South Carolina Supreme Court. The Respondents offered an affidavit of a criminal defense attorney and the testimony of an assistant solicitor, both of whom were involved in a criminal trial in the Eighth Judicial Circuit for South Carolina (the same circuit in which this case was tried) in which the trial judge allowed the defendant to make the last argument to the jury even though the defendant had offered evidence in cross examination of a prosecution witness. This isolated instance offers no cogent support for the Respondents' position. The assistant solicitor admitted on cross examination that he was not aware of the holdings *Gellis* or *Battle* and did not argue them to the trial judge. Nonetheless, for this court to agree with the Respondents' position that the "last argument" theory provided manifest necessity for the mistrial, the court would have to assume that the trial judge who granted the mistrial would have disregarded settled South Carolina law. The court is not prepared to make such a leap. It would be inconsistent to conclude that the state trial judge acted responsibly and

rationally in granting a motion for a mistrial if the basis for his decision was that he would eventually disregard settled South Carolina law at a later stage of the proceedings.

The Respondents also attempt to establish manifest necessity for the mistrial by arguing that the mistrial was necessary to preserve the trial court's inherent authority to control its procedures for admitting evidence in a trial. In making this argument, the Respondents have insinuated that defense counsel were somehow at fault in brining about the mistrial. If defense counsel were blameworthy for allowing the jury to see the unadmitted photographs, the manifest necessity standard nevertheless requires the trial judge to explore other alternative measures, short of aborting the trial, to remedy the situation. Under the circumstances in this case, like those faced by the trial court in *Harris v. Young*, "there is no indication that the traditional remedies for attorney misconduct, including censure, reprimand, contempt, or recommendation of disciplinary proceedings were not available in this case." 607 F.2d at 1086. Even if the trial judge granted the mistrial because of the misdeeds of the defense attorneys, the judge must appreciate the Defendants' constitutional rights to finish the trial with the selected jury. *See id.* ("[T]he responsible lawyer should have been punished, and not the defendant."); *see also Sloan*, 36 F.3d at 395 (" '[E]ven in circumstances where the problem [giving rise to the possible declaration of mistrial] reflects error *on the part of one counsel or the other*, the trial judge must still take care to assure himself that the situation' constitutes manifest necessity warranting declaration of a mistrial.") (quoting *Jorn*, 400 U.S. at 486). The

record in this case does not indicate that the trial judge sufficiently explored any less-drastic remedies before he granted the mistrial.

Finally, the State asserts that it moved for a mistrial only after it became apparent that the trial judge was inviting the prosecution to make the motion. This fact is not significant, however, because the Fourth Circuit has recognized that "the Double Jeopardy Clause may preclude retrial when a mistrial was neither requested nor desired by the prosecution." *Sloan*, 36 F.3d at 395. Furthermore, the prosecution's ultimate motivation for moving for the mistrial is no longer determinative. *See Jorn*, 400 U.S. at 453. As the *Sloan* court stated, "neither prejudice to the defendant nor benefit to the prosecution is significant to the mistrial determination." 36 F.3d at 395 n.6 (citing *Jorn*, 400 U.S. at 490; *Council*, 973 F.2d at 255; and *Satori*, 730 F.2d at 977).

Even assuming, *arguendo*, that the photographs were somehow prejudicial to the State, the manifest necessity standard requires that the trial judge thoroughly explore whether any alternative measures, less-drastic than a mistrial, could cure the prejudice. The Petitioners offered several viable options at the first trial, but the trial court summarily rejected them. For example, the Petitioners offered to have Office Counts recalled to the stand so that they could properly move the photographs into evidence. The judge declined to allow Counts to be recalled. In addition, when the trial judge expressed concern that the photographs had not even been authenticated, the Defendants disagreed and urged the judge to have the court reporter read back portions of Counts's testimony in

which he testified about the disputed photographs. Again, the trial judge declined.

In argument to this court, the Petitioners offered several other alternatives that likely would have remedied any potential prejudice that the photographs might have wrought upon the prosecution. For example, the parties could have stipulated that the photographs should be placed into evidence. Also, the possibility of a curative instruction was not thoroughly explored at the time of the mistrial decision. In his written order denying the Defendants' motion to dismiss the indictment because of double jeopardy, the trial judge indicated that the rejection of a curative instruction was implicit in his ruling at the time of the mistrial. However, the record does not demonstrate that the parties were given an opportunity to discuss the possibility of a curative instruction.[14]

This court is also concerned that the trial judge may have acted "precipitately in response to the prosecutor's request for a mistrial." *Arizona v. Washington*, 434 U.S. at 515. Unlike the trial judge's procedures approved by the Supreme Court in *Arizona v. Washington*, the trial judge in this case did not "evinc[e] a concern for the possible double jeopardy consequences of an erroneous ruling." *Id.* Indeed, the record contains no indication that the trial

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[14] This court recognizes that the cold record on appeal does not fully reflect the off-the-record exchanges between the trial court and counsel or the thought processes of the trial judge. However, "[t]he only way an appellate court can determine if discretion has been exercised is by close examination of the record." *Sloan*, 36 F.3d at 400.

judge was aware that the Defendants' constitutional rights against double jeopardy might be implicated by his ruling. In addition, the court did not afford defense counsel a "full opportunity to explain their positions on the propriety of a mistrial." *Id.* at 515-16. The trial judge even declined defense counsel's request for further inquiry about whether the jury even saw the disputed photographs.

For the foregoing reasons, the court concludes that the trial judge improvidently granted a mistrial in the Petitioners' initial prosecution. The jury's viewing of the disputed photographs was not unfairly prejudicial to the prosecution, and the trial judge disregarded the likelihood that he could have taken reasonable measures, other than aborting the trial, to cure whatever prejudice may have occurred. Accordingly, there was no manifest necessity for the mistrial, and the retrial of the Petitioners would violate their constitutional rights not to be placed in double jeopardy.

B. *Younger v. Harris* Abstention

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that federal courts should not enjoin ongoing state criminal proceedings absent a showing of "bad faith, harassment or any other unusual circumstance that would call for equitable relief." *Id.* at 54. The State did not raise *Younger v. Harris* abstention when the matter was before this court on the request for injunctive relief. When the case was returned to this district for an evidentiary hearing on the merits after remand, the State filed a return to the petition for a writ of habeas corpus, which,

on the next to last page, contains a one-sentence reference to *Younger.*[15] Although the return mentions *Younger* in passing, the doctrine was never argued to this court during the seven-hour hearing on July 21. Nevertheless, the court is compelled to thoroughly and conscientiously review the question of whether this court should stay its hand and allow the state trial to proceed, because, as noted by the Supreme Court, *Younger* itself is grounded on important considerations of comity, "born of . . . Federalism." *Id.* at 43-45. As this court noted at the conclusion of the July 21 hearing, a proceeding such as this, where a federal court is asked to inject itself into the interworkings of the state criminal judicial process, raises sensitive issues which obviously command that the federal court proceed cautiously and intervene only when such action is clearly appropriate.

To this end, the court conducted an exhaustive and extensive hearing on the evening of July 21 in an effort to fully develop the record so that the court would be in a position to make an informed judgment about the sensitive and emotion-laden issues presented in this case. The court searched in vain for some type of showing that the first mistrial was the result of manifest necessity. After hearing from all the witnesses each side cared to offer, and after an extensive round of oral argument, the court

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[15] The entire reference to *Younger*-type abstention appearing on page 17 of the Respondents' return is as follows: "This case at this stage is at the very core of [comity] concerns directed in *Arizona v. Washington. See also, Younger v. Harris,* 401 U.S. 37, 43 (1971)."

concluded that the first trial should not have been aborted and that the writ should issue.

Although *Younger* strongly counsels against federal intervention in on-going state criminal proceedings, most courts that have directly considered the issue have held that a claim that double jeopardy bars a retrial falls within the narrow "extraordinary circumstnace" exception recognized by *Younger*. *See, e.g., Gully v. Kunzman*, 592 F.2d 283, 286-87 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979); *Drayton v. Hayes*, 589 F.2d 117, 120-21 (2d Cir. 1979); *Jackson v. Justices of Superior Court of Mass.*, 549 F.2d 215, 216 n.1 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977); *Foster v. Murphy*, 686 F. Supp. 471, 474 (S.D.N.Y. 1988).

The idea that *Younger* abstention does not bar a double jeopardy claim was succinctly expressed by Judge Posner in *United States ex rel. Stevens v. Circuit Court of Milwaukee Co., Wisc.*, 675 F.2d 946 (7th Cir. 1982):

> [A] number of the federal courts of appeals have found [*Younger v. Harris*] considerations overborne when the petitioner is asserting a double jeopardy claim. One of the principal interests that the double jeopardy clause protects is the interest in not being tried a second time for the same offense, which is distinct from the interest in not being convicted in the second trial. To put a man to the time, expense, embarrassment, and anxiety of being tried repeatedly for the same offense is a violation of the double jeopardy clause that is not cured by acquitting him every time. So far as protecting that interest is concerned, the relevant state remedies are exhausted when, as in this case, the petitioner has nowhere else to turn in the state judicial

> system to get the charges against him dismissed before trial. The restraint he complains of in such a case is having to undergo the trial, and an injunction against the trial is a remedy for that restraint that is consistent with the traditional function of habeas corpus, which is to relieve against unlawful custody.
>
> . . . .
>
> It is the hardship of a second trial that has moved these courts to consider enjoining a state criminal trial.

Id. at 947-48 (citations omitted).

Because the Petitioners seek to avail themselves of their constitutional right not to have to face a second trial if a mistrial in the first case was improvidently granted, the case falls within the extraordinary circumstances exception to *Younger*.

III. CONCLUSION

This court is not unmindful of the serious and permanent implications of its decision to grant the writ and of the repercussions the decision will certainly have upon the participants in the case and the family of the decedent. The court has conscientiously considered the full record developed in this case and the law of double jeopardy as announced by the United States Supreme Court and the various courts of appeals. The record assembled in this case yields the inescapable conclusion that a second trial of these petitioners would run afoul of the commands of the Fifth Amendment to the United

States Constitution. Accordingly, the petition for a writ of habeas corpus is hereby granted.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

July 28, 1995
Columbia, South Carolina

FILED: February 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2434

DARRELL WAYLAND GILLIAM, JR.; PAMELA OWINGS; JAMES MATTHEW SWAIN,

Petitioners-Appellees,

versus

JAMES LEE FOSTER, Sheriff of Newberry County; CHARLES M. CONDON, Attorney General for the State of South Carolina; JAMES W. JOHNSON, JR., Circuit Court Judge of South Carolina,

Respondents-Appellants.

ORDER

The State* has filed an emergency motion seeking a stay of our mandate pending its application for certiorari to the United States Supreme Court. The State asserts that it will suffer irreparable harm if a stay is not granted and that a stay is appropriate because its petition for certiorari will present substantial federal questions. The State offers no explanation of what irreparable harm it will suffer if we fail to stay the mandate. However, by its factual reference to motions filed by Petitioners that are currently pending in the South Carolina Court of General Sessions (which seek Gilliam's release from custody and

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* We refer to Appellants collectively as the State.

Swain's and Owings' release from bond restrictions), we presume that by requesting a stay of our mandate the State seeks to ensure the continuation of the stay of enlargement.

Petitioners maintain that the only arguable harm the State might suffer as a result of our refusal to stay issuance of the mandate is that they would be enlarged. They assert, though, that because enlargement is appropriate under the standards set forth in *Hilton v. Braunskill*, 481 U.S. 770 (1987), no basis for a stay of mandate exists. In support of their contention that they are entitled to enlargement, they first argue that the State has failed to show that it is likely to succeed on the merits of its petition for certiorari or that it will present a substantial case on the merits. Second, Petitioners maintain that the State will suffer no irreparable harm; they note that the state court must have determined that they posed only a minimal threat to the community – since they all were initially released on bond – and that they posed no risk of flight – since the conditions of their bond were modified from time to time to permit them to travel outside South Carolina. Third, they contend that they will be substantially injured by a stay of our mandate because they are being subjected to custody or bond restrictions even though they cannot be retried on the pending charges pursuant to the en banc decision of this court. Finally, Petitioners assert that the public interest opposes entry of a stay, or at least fails to support it.

The district court granted the writ of habeas corpus, but subsequently entered an order denying Petitioners' enlargement. *Gilliam v. Foster*, Nos. 95-1742-17AJ;

17AJ; 95-1744-AJ (D.S.C. July 24, 1995). That deci-
s not appealed to us, and therefore we did not
the stay of Petitioners' enlargement when we
he State's request for an emergency stay pending
of the decision of the district court granting the
seeking review of our decision denying this emer-
elief, the State apparently, yet inexplicably, asked
ustice Rehnquist to stay Petitioners' enlargement.
g the test set forth in *Hilton*, 481 U.S. at 777-78,
ef Justice granted the State's application for a stay
gement and stated:

> he State will be able to present at the least a
> stantial case on the merits on appeal, and the
> er traditional factors in a stay analysis coun-
> in favor of continued custody.

Gilliam, 116 S. Ct. 1, 2 (Rehnquist, Circuit Justice

parties offer no basis upon which we could con-
hat the circumstances supporting the Chief Jus-
conclusion have changed significantly.
uently, although the issue apparently was not
y raised by the State, we view the decision of the
ustice as the law of the case concerning the appro-
ess of a stay of enlargement pending the comple-
review. Thus, we defer to this ruling without
sing application of the *Hilton* factors in the first
e. We therefore stay the issuance of our mandate
days to permit the State to file a petition for
ri. *See* Fed. R. App. P. 41(b).

tered at the direction of Judge Wilkins with the
rence of Judges Hall, Murnaghan, Ervin, Michael,

d Motz. Judge Russell concurs in the result. Chief dge Wilkinson would stay the mandate because of the portance of the issues raised by the opinions of the en ac court. Judge Widener wrote a separate concurring nion in which Judge Niemeyer joined. Judges Ham-n, Luttig, and Williams voted to deny the motion. dge Luttig and Judge Williams each wrote a separate senting opinion.

FOR THE COURT

DENER, Circuit Judge, concurring:

I concur in the decision to issue a stay of our man-e for a period of thirty days in order that the State y file her petition for certiorari.

I do not concur for the reasons set forth in the major-opinion on the order; that is to say, that we are bound the decision of the Chief Justice in considering a ion under similar, if not the same, circumstances and e not considered the merits of the matter at this time.

I have voted to grant the stay because I am of opinion the State's position on the motion for a stay is well n, and the position of Gilliam, et al., is not well taken. not suggest that the reasoning of the order of the ef Justice referred to is not persuasive.

In sum, I have voted to grant the stay on the merits of motion and not otherwise.

Judge Niemeyer joins in this concurring opinion.

dissenting:

tate's motion for stay pending the
rari because, in my judgment, this
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dle, awaiting completion of our
n into the sovereign affairs of the
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further briefing of the issue that
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ur extraordinary action last July.

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on that the discretion of the state
nistrial is at its zenith under cir-
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the Chief Justice's admonition in
ne consequences of its own deci-
ay final review of this matter by
to say the least, revealing.

ge, dissenting:

ate's motion to stay the mandate.
es of this case have changed since
granted the State's request for a
August, 1995, *see Foster v. Gilliam*,
Rehnquist, C.J., Circuit Justice), I
e motion for a stay of mandate

not governed by the law of the case. consider afresh the State's motion te and, considering the factors set *unskill*, 481 U.S. 770, 776-78 (1987),

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App

SUPREME COURT O

No.

JAMES LEE FOSTE
DARRELL WAYLAN

ON APPLICA

[August

CHIEF JUSTICE REHNQUIST

The State of South Caro of the Court of Appeals fo that court refused to stay th corpus to respondents, def ings in South Carolina. Th District Court's order and prosecution of respondents respondents pending appe corpus petition.

Respondents were pros court in 1994 on charges of the trial, confusion and dis ticular photographs which during a luncheon recess ha evidence or were merely n prosecuting attorney's moti by the trial court over res trial court calendared the c July 17, 1995. Between the trial court denied a motion charges on grounds of doub

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ix days before the
ourt for the District
n injunction, and a
d the district court's
ne judge in dissent.
ne Court of Appeals
st for a temporary
roceedings until the
habeas petition, and
on the petition as
did not apply for a
at this time.

ourt, having held an
espondents' double
petition for a writ
gh entered July 21,
her week.) The Dis-
ion to stay the issu-
e Court of Appeals
ust 8. The State then
v.

een the justification
order enjoining the
which had already
f that date, and the
rom the order of the

Court of Appeals. Nothing I do now, severa
can undo the interruption of the state trial,
fore decline to stay the District Court's or
habeas relief to the extent that it enjoins th
of the state trial proceedings.

That portion of the District Court's or
respondents from custody, however, seems t
on a different footing, and I believe that the
the traditional criteria for a stay of the enla
prisoner in a habeas corpus proceeding. T
court ruled against respondents' double jeo
on the merits. In *Arizona v. Washington*,
(1978), we held that one claiming double
reason of a second trial must show that
"manifest necessity" for the trial court to gra
mistrial motion. And we stated that the trial
ment about the necessity is entitled to gre
never more so than when the judgment is
evaluation of such factors as the admissi
dence, any prejudice caused by the introdu
evidence, and the trial court's familiarity w
Id., at 513-514. *Washington* indicates that the
able to present at the least a substantial case
on appeal, and the other traditional facto
analysis counsel in favor of continued custo
v. Braunskill, 481 U.S. 770, 777-778 (1987) (d
circumstances in which a stay of enlargeme
granted under Fed. Rules App. Proc. 23(c) a
are virtually identical to this Court's Rule
36.4). I will therefore stay the enlargement o
under the District Court's July 21 order pen
tion of the State's appeal from that order

FILED: August 8, 1995

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2434

DARRELL WAYLAND GILLIAM, JR., JAMES MATTHEW SWAIN, AND PAMELA OWINGS,

Petitioners – Appellees,

versus

JAMES LEE FOSTER, SHERIFF OF NEWBERRY COUNTY, CHARLES M. CONDON, ATTORNEY GENERAL OF SOUTH CAROLINA, AND JAMES W. JOHNSON, JR., CIRCUIT COURT JUDGE OF SOUTH CAROLINA,

Respondents – Appellants.

ORDER

Respondents have appealed from an order of the district court granting Petitioners' request for a writ of habeas corpus. Presently before the en banc court are Respondents' motions for expedited consideration of this appeal and for temporary relief from the order of the district court pending appeal. The court has voted to grant Respondents' request for expedited consideration of this appeal and the matter has been calendared for oral

Nevertheless, on July 20th, the en banc court granted a temporary stay of Petitioners' state criminal trial. *Gilliam v. Foster*, No. 95-2334, 1995 WL 444596 (4th Cir. July 28, 1995) (en banc). We concluded that Petitioners had counterbalanced the forceful comity and pragmatic concerns counseling against intervention with a colorable claim that the second trial violated their right not to be twice placed in jeopardy for the same offense. This conclusion, rendered on the record then before us, was based on Petitioners' strong showing that the declaration of a mistrial based on a motion by the State during their prior trial was not supported by manifest necessity. Thus, in the view of the majority, the temporary stay was the only means available to avoid the irretrievable loss of Petitioners' constitutional rights. We imposed a temporary stay until the district court ruled on the merits of Petitioners' claims, and we directed the district court to proceed as expeditiously as possible to rule on the merits.

The following day, the district court conducted a thorough evidentiary hearing. Subsequently, it entered a comprehensive and thoughtful decision concluding that the retrial of Petitioners was, indeed, barred by the Double Jeopardy Clause. Accordingly, it granted the writ of habeas corpus, thereby enjoining further prosecution.

The State has appealed from the order of the district court. In addition, the State has moved for expedited consideration of the appeal and relief from the district court order pending a decision of this court. The State submits that the jury empaneled to decide the second state criminal trial has not yet been released and apparently believes that if this court grants the relief it seeks, the prosecution may resume and the case be completed.

We have ag
expedited basis
the en banc cour
set forth below,
that the State's
order pending a

In *Younger v*
Court plainly c
with state crimin
except in the m
stances. But, th
recognized that
to enjoin state c
a "showing of b
circumstance that
U.S. at 54 (emp
state proceeding
taken in bad fai
over, there is n
sought the mistr

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[1] It is impor
presented to the c
State should be g
of this appeal fro
writ of habeas co
on the merits of t
on the merits play
stay of the order
Israel, Ltd. v. Breal
Cir. 1991). So, som
positions of the
unavoidable.

e who granted it were acting in bad faith

s, as *Younger* prudently recognized, these
y circumstances that may justify federal
on. The decisions of other courts unani-
ize that a colorable Double Jeopardy
a preeminent example of one of the very
circumstances" justifying federal court
state proceeding. *See Mannes v. Gillespie*,
312 (9th Cir. 1992), *cert. denied*, 113 S. Ct.
r v. Leapley, 977 F.2d 1259, 1261 (8th Cir.
Samaniego, 814 F.2d 200, 201 n.5 (5th Cir.
novan, 747 F.2d 42, 44 (1st Cir. 1984) (per
Willhauck v. Flanagan, 448 U.S. 1323, 1325
it Justice 1980). Indeed, the justification
ference in state criminal proceedings is at
ling when the retrial itself irretrievably
fendant of his constitutional double jeop-
hen the prosecution is undertaken in bad
ss the defendant. Consequently, although
nterference with ongoing state criminal
uld be undertaken in only the most lim-
d circumscribed of situations, when the
emonstrates a colorable showing that the
ute a violation of the defendant's double
federal court intervention is appropriate.

on the record then before us, this court
ned that Petitioners had made a strong
olorable double jeopardy claim for the
in the previous order of this court which
herein by reference. *Gilliam v. Foster*, No.
L 444596 (4th Cir. July 28, 1995) (en banc).

Those reasons are even more compelling at this juncture because the district court has now considered the matter on the merits, rendered a decision setting forth in detail the factual findings and conclusions of law supporting its decision, and ruled that Petitioners' double jeopardy rights will be violated by retrial.

In its request for relief from the order of the district court pending appeal, the State asserts that proper deference has not been accorded to the decision of the state trial judge to grant the mistrial, suggesting that the highly deferential standard that the Supreme Court established in *Arizona v. Washington*, 434 U.S. 497 (1978), has been disregarded. Not so. As surely as *Arizona v. Washington* stands for the proposition that a high level of deference must be shown to the decision of the trial judge concerning the propriety of granting a mistrial, that decision stands for the proposition that this deference is not unlimited. *Id.* at 514. Because a defendant possesses a constitutional right to have a particular tribunal decide his guilt or innocence once jeopardy has attached, manifest necessity must exist for the grant of a mistrial over the defendant's objection if he is to be subject to retrial. *Id.* at 505. And, a reviewing court must be convinced that the trial judge exercised sound discretion in reaching its decision to grant the mistrial.[2] *Id.* at 514. As the matter

---

[2] The state trial court never found the photographs to be inadmissible. The closest it came to doing so was to suggest that it could not speculate on whether the photographs would have been admitted. And, this must be viewed against the backdrop of the State having no objection to the admission of the photographs when the prosecuting attorney believed that they were being offered into evidence, the State's admission to this

stands before this court, the district court con-
hat given the nature of the photographs, the
nces surrounding the jury's viewing of them,
ability of obvious and adequate alternatives to
ial,[3] and the record of the consideration under-
the state trial court in evaluating the propriety
trial, the state trial judge did not exercise sound
n in granting the mistrial and that manifest
did not exist. The State presently does not assert
district court misstated the law of double jeop-
hat the factual findings of the district court are
rroneous, although it does note that contrary
was presented.[4]

---

rior argument before the panel that the photographs
jectionable save perhaps that they were cumulative,
ater admission of the photographs, over the State's
during the second trial. In addition, the state trial
de no finding of prejudice when the mistrial was
ater, in response to Petitioners' motion to dismiss, the
judge characterized the incident as prejudicial, but
ered any reason why the jury's viewing of the
hs might have prejudiced either party.

district court found that, assuming *arguendo* that the
ving of the photographs was somehow prejudicial, the
judge declined to permit Officer Counts to be recalled
e photographs could be offered into evidence, thereby
ently ignoring a viable alternative offered by the
at could have cured any prejudice.

State also emphasizes that it was defense counsel that
nsible for causing the unadmitted photographs to be
fore the jury. It is true that the state trial judge
found that, perhaps through innocent mistake,
ounsel was responsible for permitting the jury to view
itted photographs and that this finding is entitled to a
ion of correctness. *See* 28 U.S.C.A. § 2254(d) (West

Rather, the principal basis underlying the State's
est that this court grant it relief is its contention that
ll be irreparably harmed by a delay in completing
oners' second trial until this court has ruled. Of
se, the State's argument is premised on the assump-
that ultimately it will be permitted to resume the
ecution. If the second trial is not permitted, then no
results from a temporary postponement. And,
d on the showing the State has made thus far, its
hood of final success on the merits is bleak. Further,
tate offers nothing to support its claim that it will be
arably harmed if this court does not grant temporary
from the order of the district court, except the
ralism concerns previously discussed. As noted
e, this appeal has been scheduled for argument on
ember 26, 1995. The State does not assert that wit-
es or evidence may become unavailable, that memo-
will fade, or that its prosecution of Petitioners would

. Nevertheless, the fact that defense counsel may have
or were, responsible for the error is not determinative of
her manifest necessity existed for the grant of the mistrial.
ited States v. Jorn, 400 U.S. 470, 482-86 (1971) (plurality), a
lity of the Supreme Court rejected the notion that it made a
rence which party committed the error when the defendant
ses a mistrial. And, although this court has intimated that a
ndant's right to a decision by an empaneled jury is
cularly strong when the prosecution has caused the error,
Inited States v. Shafer, 987 F.2d 1054, 1057 & n.4 (4th Cir.
), this court has also held that a defendant's double
ardy rights may be violated when defense counsel was
y responsible for the error, *see United States v. Sloan*, 36 F.3d
4th Cir. 1994). *See also Harris v. Young*, 607 F.2d 1081, 1085-86
Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

ay by this delay. The only con-
ate might suffer is that the jury
decide Petitioners' guilt, while
influences and therefore able to
ecome tainted in the interim.
urance that the state trial judge
resume if the State is granted
tate trial judge apparently sug-
al could be resumed an inquiry
eady had been tainted would be
tate points to no circumstance
ficant change will take place in

Petitioners were prosecuted dur-
appeal and it were later deter-
ourt was correct in concluding
heir constitutional rights, Peti-
e. Consequently, the balance of
vor of the State.

, as the dissenting members of
at our intervention in the state
disrupted it. This is particularly
this disruption could have been
f this court or the district court
anted a temporary stay of the
ial began. This matter was pre-
rt and to a panel of this court in
ror being selected, and ample
the imposition of a temporary
ek preceding the scheduled sec-

that, because South Carolina law
erlocutory appeal of the double
pellate courts of that state were
this matter in the first instance.
tion of Petitioners' claims shows
those courts. Indeed, the South
s are well equipped to determine
constitutional or otherwise, com-
s. The rub in this instance is that
ules the correction that could be
ts would come too late to safe-
right at stake. *See Abney v. United*
660-62 (1977) (Double Jeopardy
multiple prosecutions as well as
d punishments.).

unate that a suggestion has been
dges must now sanction all types
ant a mistrial. While there may be
application of *Arizona v. Washing-*
l no retreat from the deferential
Court has established. And, the
rial judges must act in granting a
m the intervention of the federal
minal proceeding in this instance,
afforded by the Double Jeopardy
ion, as it has been interpreted by
ich requires manifest necessity to
of a mistrial over a defendant's
has attached; even if this court
n this state criminal proceedings,
tion obtained would nevertheless
compliance with the Constitution.

Unquestionably, a federa
authority to stay a state crim
most limited circumstances. T
corpus on the basis that the
Petitioners would violate thei
be twice placed in jeopardy
exceptional circumstance tha
state criminal proceedings by
question presently before thi
is entitled to temporary reli
our full review. The State ha
question concerning the corr
district court and has failed t
irreparable harm by awaiting
court. In contrast, Petitioners
able loss of their constitution
the State the relief it seeks.
the hardships tips decidedly
result, the court denies the
pending appeal from the d
granting the writ of habeas

Chief Judge Ervin, Judg
Judge Hamilton, Judge Wi
Judge Motz join this opinio

WILKINSON, Circuit Judge,

I dissent from the deni
court order granting the wri
remand this case to the di
directions to dismiss the p
interference with this ongoi
cease.

d exercise its
ng in only the
writ of habeas
prosecution of
al right not to
offense is an
e enjoining of
ourt. The only
ether the State
order pending
se any serious
e ruling of the
will suffer any
decision of this
ffer an irrepar-
ne court grants
the balance of
etitioners. As a
State for relief
district court

ge Murnaghan,
Michael, and

of the district
orpus. I would
with immediate
en banc court's
inal trial must

usly before this court,
parate dissenting opin-
ving the state criminal
ay as a step of unprec-
d severely impair the
ithin this circuit. Now
n reconfirmed in that
f interference in the
had been forbidden
is, 401 U.S. 37 (1971),
U.S. 479 (1965), to
me showing of pros-

al bad faith. The dis-
ecord to indicate that
h or improper motive
her, the district court
the state court's find-
at caused the photo-
re the state trial jury.
the dismissal of the
state court proceed-
and the en banc court
a stay. Three defen-
enses of murder and
of their peers. More-
e dismissal of a mur-
own mistakes.

deralism. It casts an
state judiciaries (see
. When the costs in
to the costs of the

aborted criminal prosecutions, the sum is
itemized accounting shows the following

A state trial judge has recused himse
reason than that this federal habeas petitio
Attorneys have argued repeatedly and
taneously before state *and* federal court
vance and the prejudicial effect of evidenc
state proceeding. An en banc court overt
decision and stayed state proceedings w
argument and with far less than adequate
review the disputed photographs. A state
home and a state trial was indefinitely
virtue of the federal ruling, and, of cour
district court entered orders first denyi
granting the writ. The federal interventi
and furious, on an issue that the state supr
dismissed as interlocutory. As a result of
ings, the state trial remains in abeyance,
ground for yet another mistrial, this o
actions of this court.

Even now, the confusion refuses to aba
oral argument was set before the en banc
tember 26th, 1995. In the meantime, the st
continues in limbo. The jury was sent hom
tation of the prosecution's case. What the j
or learn about this case during the per
court's proceedings is anybody's guess.
state trial judge properly instructed the jur
about or discuss the case, any further d
court will be a minimum of two months i
the jury has, understandably, not been s
that period. The problems are worsening,

en banc court emphasized its own view of the merits of the underlying claim, contending that the state court acted "precipitously", "irresponsibly", "abused its discretion" and "ignored an obvious and completely adequate alternative" to remedy the error. Why the en banc court even bothered to remand the case for further proceedings is a mystery to me. Even as it did so this court showed its hand, declaring that: "The undisputed facts demonstrate that the state trial judge acted without any rational justification in granting the mistrial." It is small wonder, then, that the outcome of the hearing on remand produced a complete turnabout from the earlier result.

It is a dreadful outcome. Any decision aborting a state criminal trial would have adverse repercussions. But a decision of the en banc court cannot help but reverberate throughout the state courts of this circuit. State courts will now be required to tolerate errors in state criminal proceedings because the grant of a mistrial carries an unacceptable risk of federal interference.[3] Without the use of this corrective, state proceedings may become

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[3] The majority, moreover, has created a significant strategic opportunity for counsel in overturning the state trial court ruling in this case. Improper placement of evidence before the jury by defense counsel may now redound to its own benefit in one of two ways. If, as a result of the error, a mistrial is declared over the objections of the defense, the prospect of federal interference on double jeopardy grounds is distinct. If, on the other hand, a mistrial is not declared, the improper admission of evidence can still work to the benefit of the defense. Federal interference in state criminal trials is problematic under any circumstances; it is especially unfortunate when it creates a no lose proposition for one side in a state criminal case.

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Here the state court granted a mistrial for the most legitimate of reasons. The trial court found that the disputed photographs had been improperly presented by defense counsel to the jury. It has now been argued on the one hand that the photographs are nothing more than cumulative and that they simply show the scene of the crime from different angles. It has been argued on the other hand that they were confusing to the jury on the critical issue of the location of the parties at the time of the shooting and that the red spots in the challenged photographs have never been determined to be human blood. This whole debate is beyond our ken. I cannot imagine that the federal judiciary has reconstituted itself as a super state trial court, and has involved itself in the minutiae of this garden variety evidentiary question.

More importantly, the trial judge sought to protect the integrity of the state's evidentiary admissions process. As I explained in my earlier dissent: "A trial judge was acting to protect nothing more than the integrity of evidentiary admissions. That process ensures a proper foundation is laid for the admission of evidence, and that the same is duly authenticated. It serves notice to all parties and participants in a trial of what is properly before the jury and what constitutes the record for appeal."

The state trial court found the admission of those photographs was both prejudicial and improper. *Arizona* requires that we support, not undermine, its decision. But the en banc court has not supported the state's attempt to safeguard its most basic rule of evidence. It has proceeded to undertake a remarkable exercise in hindsight marked by an indefatigable inclination to second guess. A

jury of South C
have, a chance t
defendants. Thi
accused of these
satisfaction to la
of any other sta

Judge Russe
Judge Luttig joi

Filed: July 25, 1995
Corrected order filed: July 28, 1995

PUBLISHED

D STATES COURT OF APPEALS
OR THE FOURTH CIRCUIT

No. 95-2334

LLIAM, JR., JAMES MATTHEW SWAIN
OWINGS,

Petitioners-Appellants,

FOSTER, SHERIFF OF NEWBERRY
ARLES M. CONDON, ATTORNEY GEN-
TH CAROLINA, AND JAMES W. JOHN-
RCUIT COURT JUDGE OF SOUTH

Respondents-Appellees.

ORDER

1995, Petitioners presented an emergency
nel of this court, seeking relief from an
rict court denying their request to tempo-
tate criminal proceedings against them
egin Monday, July 17, 1995. Petitioners
rial will violate their constitutional right
placed in jeopardy for the same offense.
d oral arguments of counsel on Saturday,
xpedited basis. Following a conference at
e hearing, the panel denied Petitioners'
f – Judges Wilkinson and Luttig voting to

deny and Judge Wilkins voting to grant. On the morning of July 17, Petitioners requested en banc reconsideration and a poll of the entire court was requested. Chief Judge Ervin and Judges Hall, Murnaghan, Wilkins, Hamilton, Williams, Michael, and Motz voted in favor of en banc consideration and of granting the requested temporary relief. Judges Russell, Widener, Wilkinson, Niemeyer, and Luttig voted against en banc consideration and granting the requested temporary relief. Accordingly, the poll of the court for en banc consideration has carried and the motion for relief from the decision of the district court denying the temporary restraining order is granted.

Therefore, a temporary restraining order enjoining the state criminal proceedings until the district court rules on the merits of the habeas petition is hereby issued. As expeditiously as possible, the district court is directed to receive such evidence and take such testimony as necessary and to rule on the merits of Petitioners' habeas petition.

Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer, and Luttig have issued separate statements.

FOR THE COURT

BY: _____
Clerk of Court

WILKINS, Circuit Judge:

It is highly regrettable that this court is compelled to temporarily enjoin a state criminal proceeding that began on July 17, 1995. It is even more regrettable that we must act while that proceeding is in progress. Of course, the

ry stay should have been granted days ago by the court or by a panel of this court after hearing the nts of counsel last Saturday, July 15, 1995. Because rict court and the panel erred in failing to issue a ry stay, we must act in a manner that undeniably disruption in the state proceeding. But, the issu- a stay is the only means available to protect ers' constitutional right, and under the present tances, the vindication of Petitioners' basic consti- right far outweighs the temporary suspension of e proceeding. Any temporary disruption of the oceedings will be quickly remedied by an expe- earing in the district court at which time it will e opportunity to address on the merits for the first e issues presented.

nough the relief sought is appropriate in only the nited circumstances, the present situation is firmly assed within those narrow circumstances. First, it be seriously disputed that the ongoing state crimi- ceedings violate Petitioners' constitutional right e placed twice in jeopardy for the same offense. bstantive double jeopardy question presented is the state trial judge in an earlier state criminal ercised sound discretion in finding that manifest y existed for a mistrial. The undisputed facts trate that the state trial judge acted without any justification in granting a mistrial. Second, given itioners have asserted a strong double jeopardy ne only means by which their right not to be put urden, anxiety, and expense of enduring a second y be protected is to stay the state criminal pro- s until the district court may rule on the merits of

ers' habeas petition. Finally, the federalism con-
xpressed in *Younger v. Harris*, 401 U.S. 37 (1971), do
nsel against the grant of relief under these circum-

TS

State Trial Proceedings

itioners were prosecuted in November 1994 on
harges; the State represents that the charges
d murder (Petitioner Swain) and aiding and abet-
etitioners Gilliam and Owings). It appears that
as no significant question concerning Petitioners'
ation in the events; rather, the trial was focused
ssue of whether the actions leading to the victim's
ad been taken in self-defense or had been pro-

the third day of trial, the State presented the
ny of Officer Counts of the South Carolina Law
ement Division. Officer Counts had been present at
ne soon after the shooting and could identify
raphs of the scene and testify concerning the
iate investigation. On cross-examination, defense
asked Officer Counts whether there had been
found at the scene. Officer Counts stated that he
have to look at photographs taken by a police
rapher to refresh his memory. Defense counsel
a group of photographs to the prosecuting attor-
t 1)[1] and then handed them to the witness; as had

et 1 contains the seven photographs at issue. At oral
nt before this court, the State suggested for the first time

other photog
graphs in Se
trial. The pro
graphs were
out objectio
defense cou
dence at that
was using th
The prosecu
maturely.

Officer C
graphs. He
the position
Officer Cou
where inves
drops of blo
tape; he als
had been pr
admitted in
found. Dur
Counts, two
(Sets 2 and
defense wit

Followi
judge recess

that it was n
referred to as
Counts. Alth
even if the
photographs,
and tempora

bed as Sets 2 and 3), the photo-
rovided to the defense prior to
rney – believing that the photo-
into evidence – stated, "With-
judge then inquired whether
ring the photographs into evi-
ense counsel responded that he
efresh the officer's recollection.
noted that he had spoken pre-

uently testified from the photo-
at they depicted and identified
ects shown in the photographs.
three locations on the ground
ocated what they believed to be
arked the location with yellow
a diagram of the scene (which
e prosecution and was already
where the drops of blood were
aining testimony by Officer
s of photographs of the scene
roduced into evidence by the
n.

unts' testimony, the state trial
dings for lunch, instructing the

e record whether the photographs
ually the ones presented to Officer
had not previously been disputed,
orrect that these are different
the appropriateness of the mistrial
the same.

photographs and evidence that had
Officer Counts was testifying in the
e lunch break, the court reporter
otographs in Set 1 – which had not
evidence – had been placed on the
ong with the photographs in Sets 2
een properly introduced into evi-
the jury may have been exposed to
properly admitted, the trial judge
tention of counsel.

ng any prejudice that may have
's viewing of the photographs, the
ely moved for a mistrial, blaming
ne error. The defense strenuously
with the prosecuting attorney's
e counsel had been responsible for
ed photographs where the jury
eover, defense counsel argued that
letely unnecessary. Importantly,
d to "recall [Officer Counts] and
s] into evidence," explaining that
ready identified the photographs
ut them. Further, defense counsel
the jury actually saw the photo-
prejudice.

ge called the foreman of the jury to
ed him whether, as far as he knew,
t all of the photographs that had
the jury rail before lunch. The
s far as he knew, they had. The

defense requested that the t
tions to ensure that the jury
ted photographs, noting tha
the photographs had been
railing during the lunch bre
ollected that they had been
the court recessed. The state
to do so and declared a mi
The state trial judge stated
grant a mistrial because th
admitted, were not identifie
to.

Defense counsel reques
ask the court reporter to re
mony because he, in fact, h
and testified using them. A
judge summarily declined
state trial judge indicate
double jeopardy concerns w
a mistrial. And, neither the
judge indicated that the p
prejudicial to the State or

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[2] The state trial judge dic
necessity or a finding of preju
word "prejudice" during this p
judge gave no hint of what pr
which a reviewing court co
resulted.

dditional ques-
en the unadmit-
ly possible that
e stack on the
nse counsel rec-
tness box when
owever, refused
fense objection.
o choice but to
s had not been
ot been testified

state trial judge
er Counts' testi-
he photographs
r, the state trial
o point did the
s that possible
l by the grant of
or the state trial
ere in any way

nding of manifest
e did not use the
ther, the state trial
ossibly exist from
that "prejudice"

Petitioners appealed this ruling to the S
Supreme Court. However, that court d
appeal as interlocutory under South Carol

C. Federal Habeas Proceedings – Dis

Petitioners then filed this action in dist
suant to 28 U.S.C.A. § 2254 (West 1994),[4] cla
upcoming second trial violated their right n
put in jeopardy for the same offense becaus
necessity existed to support the grant of t
the first trial. The State responded that man
had existed for the mistrial to "alleviа
caused by the jury's consideration of un
dence; however, the State utterly failed
identify what possible prejudice may have
June 29, 1995, Petitioners sought a tempor

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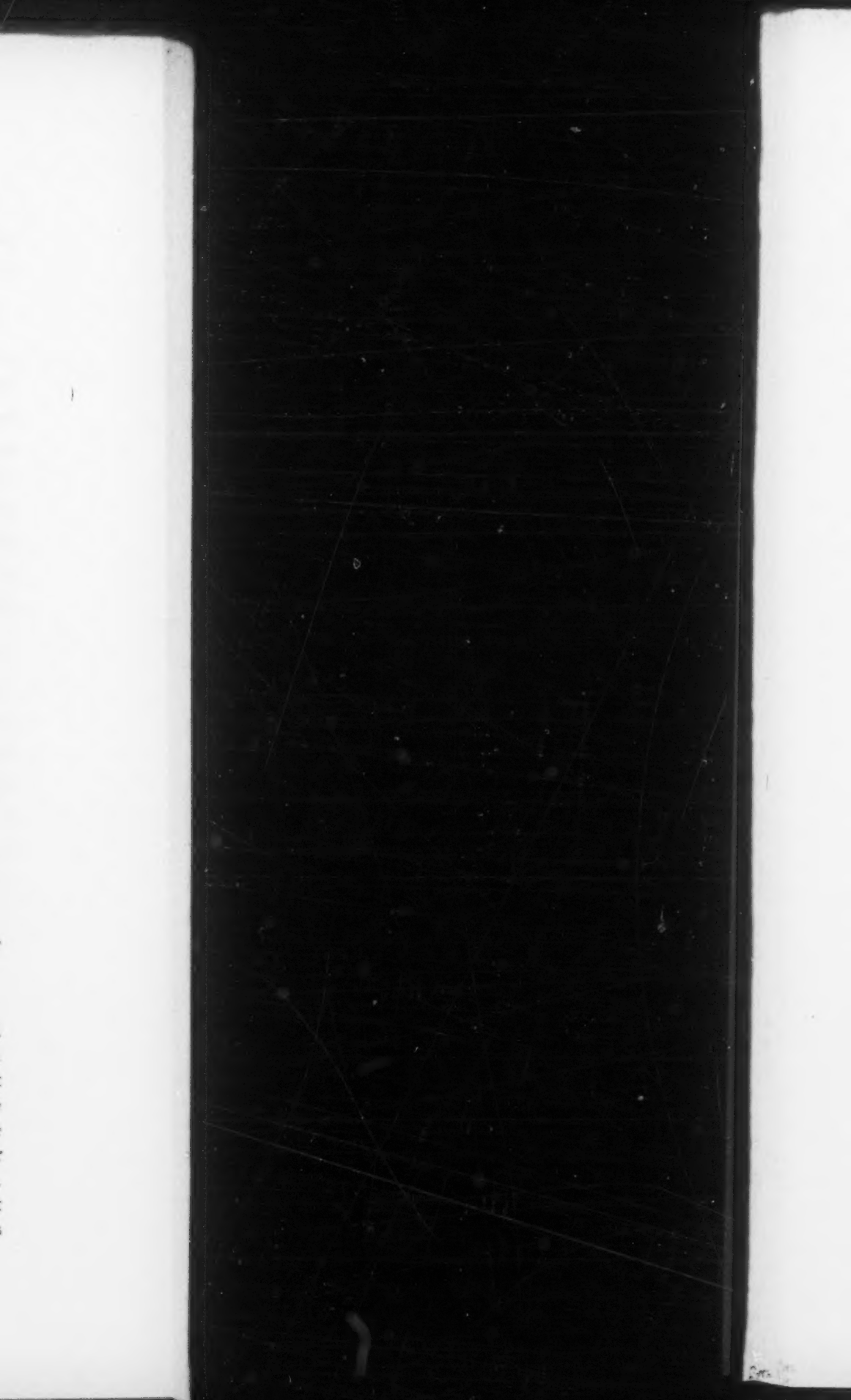
conjectural." Saying that something is "sp
conjectural" does not make it so. The State does
Officer Counts was available and that had th
allowed to recall him to the stand as it specificall
photographs would have been admitted a
exhibits, just like the photographs in Sets 2 and

[4] There is no question concerning the prop
habeas consideration of the petition given
posture. As discussed at length in the magistrat
and recommendation, Petitioners are in cus
exhausted their state remedies. A federal habe
only forum in which Petitioners may attempt
double jeopardy right not to be tried twice for th
And, it should be noted that there is no s
Petitioners have not proceeded in as timely
possible in bringing this issue before the court.



> the decedent's property or on the public roadway at the time he fired his weapon. The disputed photographs are close up photographs of the ground which show blood stains. Because of this, they could be used to more clearly document where the shooting occurred.

As noted by the district court, this conclusion was based only on purely speculative statements of the State's attorney, not on any evidence in the record: no testimony was taken on this issue; no evidentiary hearing was conducted; and a simple review of the photographs does not bear out the State's assertion. Significantly, although the district court concluded that the photographs could be used to demonstrate more clearly where the shooting had occurred, it did not find that the photographs were prejudicial, as opposed to simply relevant.

The district court further determined that defense counsel may have been attempting to place this evidence before the jury through the back door while retaining the right to make the last argument to the jury under a South Carolina procedural rule that permits the defense to make the last argument if it does not present evidence. This basis for the decision of the district court was also based only on a statement by a State's attorney and was not supported by any foundation in fact. This argument bordered on the spurious and has effectively been abandoned on appeal.

It is well-settled law in South Carolina that if the defense introduces any evidence, whether in its case or in the State's case, it loses the right to have the last argument. *State v. Gellis*, 155 S.E. 849, 855 (S.C. 1930); *State v. Battle*, 403 S.E.2d 331, 333 (S.C. Ct. App. 1991). Moreover,

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the State. The prosecuting attorney subsequently raised an objection to the admission on the ground that the photographs were *cumulative and confusing*. The state trial judge overruled the objection. In a supplemental reply, the State confirmed that the basis for its objection to the evidence was that the photographs were cumulative and confusing. The parties also informed this court that the state trial judge who presided at the first trial and who is a named respondent in this litigation, *sua sponte* recused himself before the retrial began.

II.

A. Balance of Hardships

All parties have framed the question of the appropriateness of the requested relief in terms of the balancing of the hardships test employed in the federal courts of this circuit to decide whether preliminary injunctive relief should issue. *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977).[5] With respect to that

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[5] Under *Blackwelder*, whether a preliminary injunction should be granted depends upon an analysis of four factors: (1) the likelihood of irreparable harm to the party requesting relief if the preliminary injunction is denied; (2) the likelihood of harm to the party opposing relief if the preliminary injunction is granted; (3) the likelihood that the party requesting relief will succeed on the merits; and (4) the public interest. *See Direx Israel, Ltd. v. Breakthrough Medical Corp.*; 952 F.2d 802, 812 (4th Cir. 1991). A court should examine each of these factors sequentially, determining whether, and to what degree, each factor weighs in favor of the party requesting relief. *Id.* at 812-14. With specific reference to the likelihood of success on the merits, it is not necessary for the party requesting relief to prove that it *would* prevail on the merits; at most, it is only

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Operating Co., 22

Jeopardy

ttled that in a jury trial jeopardy attaches
s empaneled and sworn. *Crist v. Bretz*, 437
8). Once jeopardy has attached, a defen-
titutional right to have a particular tribu-
guilt or innocence. *Id.* at 36.

s why this "valued right" merits con-
protection are worthy of repetition.
first trial is not completed, a second
may be grossly unfair. It increases
ial and emotional burden on the
rolongs the period in which he is
d by an unresolved accusation of
g, and may even enhance the risk
nocent defendant may be convicted.
of such unfairness to the defendant
never a trial is aborted before it is

ington, 434 U.S. 497, 503-04 (1978) (foot-
For these reasons, a prosecutor is gener-
nly one opportunity to force a defendant
d. at 505.

ircumstances, however, this right may be
d a defendant may be retried after a mis-
ranted, when "the public's interest in fair
to end in just judgments" has been
v. Hunter, 336 U.S. 684, 689 (1949). The
has concluded that only when there is a
sity" for a mistrial granted over a defen-
will the prosecuting authority escape the
y bar. *Arizona v. Washington*, 434 U.S. at
necessity" for the grant of a mistrial is not

a mechanical standard; rather, it is a determination that must be made in the context of the specific difficulty facing the trial judge. *Id.* at 506. And, while manifest necessity for a mistrial does not require that a mistrial be "necessary" in the strictest sense of the word, it does require a "high degree" of necessity. *Id.* Perhaps the clearest example of a situation in which manifest necessity exists for a mistrial is when a jury that has heard all of the evidence cannot reach a verdict. *Id.* at 509. At the other extreme are situations in which a prosecuting attorney seeks a mistrial in order to have additional time to marshall evidence to strengthen the case against the defendant. *Id.* at 508. Between these two extremes exists a spectrum of trial errors, some raising the specter of manifest necessity for a mistrial and others falling far short of creating a situation in which a mistrial is manifestly necessary. *See id.* at 510.

In determining whether manifest necessity existed, a reviewing court must "accord the highest degree of respect to the trial judge's evaluation of the likelihood that the" circumstances giving rise to the mistrial would have affected the impartiality of the deliberations of the jury. *Id.* at 511. Indeed, when some event creates the possibility that the jury may have been biased, the deference a reviewing court affords the trial judge who has the opportunity to observe the sequence of events in the context of the trial is at its zenith. *Id.* at 512-14. The trial judge need not make an explicit finding of manifest necessity or articulate the factors that led to the exercise of his discretion, and his decision is not subject to attack when the record adequately discloses the basis for his ruling. *Id.* at 516-17.

e deference owed to the trial judge, however, is not ted; in reviewing the decision to grant a mistrial urt has "an obligation to satisfy [itself] that . . . the dge exercised sound discretion." *Id.* at 514 (internal ion marks omitted). When the grant of a mistrial by al judge amounts to an irrational or irresponsible must be found to have abused his discretion in g that manifest necessity for the mistrial existed. *Id.*

Arizona v. Washington, the Supreme Court looked eral factors in determining that a state trial judge ercised sound discretion in granting a mistrial. The noted that the trial judge had been presented with tion in which the jury had been exposed to inad- le and highly prejudicial material and that the trial had not acted precipitously. *Id.* at 514-15. Rather, al court expressed concern regarding the possible jeopardy consequences of an erroneous declara- a mistrial and heard extensive argument on the priateness of such a measure, including consider- f possible alternatives to the mistrial. *Id.* at 515-16. anscript of the state proceedings demonstrates that f these factors were present here.

rst, the state trial judge was not faced with a situa- which inadmissible material had been presented jury.[6] The unadmitted photographs were only pic- taken by state investigators, of the same area of the scene, from a slightly different angle or shorter

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My research has failed to disclose a single case in which a urt has granted a mistrial merely because *admissible* ce was inadvertently presented to the jury without its admission.

ce, as other photographs that were properly admit-
e photographs in Sets 1 and 2 showed the scene,
ing the same three pieces of yellow tape that Offi-
unts testified marked what appeared to be drops of
the only difference between those sets of photo-
was that the photographs in Set 1 showed the
of blood within the yellow taped areas more
. At oral argument, after careful questioning from
nel, the State conceded that the photographs in Set
properly admissible under South Carolina law and
ad the defense simply moved them into evidence,
would have been no error.[7]

ne proceedings in this court have focused on
er the jury's consideration of these photographs
d prejudice or biased the jury in some way. It
be disputed that as relevant evidence, the photo-
had probative value. Nor can it be disputed that
otographs showed more clearly what appeared to
eral drops of blood. But, the simple fact is that
Counts already had testified that there were three
where what appeared to be drops of blood were
ered by investigators and that these areas had been
d by yellow tape. Further, Officer Counts had also
ied on a crime scene overlay where these areas
ocated. Although the State conceded that there was
g inherently prejudicial about the photographs and
e only "prejudice" resulting from the jury's having

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n addition, any suggestion that these photographs were
issible has been laid to rest by the subsequent
dings in the ongoing second state trial.

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[8] At
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they had not been formally intro-
efore this court that because Offi-
tified concerning the photographs
might be able to mislead the jury
on of the taped markings or the
wever, the mere fact that the State
on does not necessarily make it so.
w of Officer Counts' testimony and
1 and 2 belies the State's claim and
hat the photographs in Set 1 and 2
all relevant respects as the State
urt and argued to the trial judge in

using on what possible use of the
cution or defense may have made
ing the later trial proceedings begs
ontext, the initial consideration in
a mistrial is warranted is whether
ed in some way. There is simply no
be made that these cumulative,
s biased the jury. As the State con-
was in the fact that they had not
tted into evidence.

in argument before this court, in
om the panel concerning whether the
have committed reversible error if he
photographs had the defense moved
e represented that although the failure
s would have been error, it might not
rror because the photographs were
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trial judge acted precipitously: he
el's request to determine whether
seen the photographs in question;
ne whether Officer Counts had in
tographs by referring to his testi-
ly to look at the photographs and
ility; he refused to allow defense
ecall Officer Counts and formally
admission into evidence; and he
reness that the grant of a mistrial
rive Petitioners of their constitu-
conceded in argument before this
othing to prevent the state trial
owing Officer Counts (who was
ailable) to be recalled to have the
introduced, as defense counsel
ne. Without question, this would
ical, and only, error that had
in the absence of any prejudicial
lge refused to consider or imple-
completely adequate course of
ossible error in the jury having
lence that had not been properly

that "[i]n order to determine if
d by manifest necessity, the criti-
ss drastic alternatives were avail-
afer, 987 F.2d 1054, 1057 (4th Cir.
eviously noted:

> o consider in assessing the
> court's action is whether a
> sary. If *obvious and adequate*

> *alternatives to abortin*
> *this suggests the trial*

Harris v. Young, 607 F.2d
(emphasis added), *cert. de*
also United States v. Sloan,
(even if the trial judge had
that a mistrial was necessa
an abuse of discretion if th
trial judge's concerns); *Sha*
natives existed, then so
designed to end in just judg
the defendant's right to h
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Under these circumsta
tioners have made a stron
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sibly in granting the mistri
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4 (4th Cir. 1979)
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Abney v. United States, 431 U.S. 651, 660-6
emphasis added); *see also United States v.*
470, 479 (1971) (plurality); *Green v. United S*
184, 187 (1957); *United States v. Ball*, 163
(1896). Consequently, a stay of the state crir
ings is the only means to protect Petitio
tional right.

D. *Younger* Abstention

The members of the panel majority h
apprehension over the appropriateness o
rarily staying the state criminal proceed
federalism concerns expressed in *Younger*
U.S. 37, 43 (1971). However, on the narro
circumstances presented here, *Younger* do
in favor of abstention.

First, the State has not requested th
from exercising jurisdiction or from granti
ary relief requested; the State has not rais
issue in the district court or before us.[9]

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[9] Judge Luttig writes that "the State emp
the *Younger* issue." In all of the submissions
cannot find where it ever used the word "abstai
Younger. As support for the claim that the State
such an argument, Judge Luttig points to the S
Sparks v. Garrison, 446 F. Supp. 649 (M.D.N.C.
the State referred to *Sparks* only to support its c
finding that Petitioners were unlikely to preva
justified a refusal to enjoin the state proceedi
public interest did not favor the granting of t
See Respondents' Response to Motion for Reconsid
Banc at 12-13, 18. It is abundantly clear that the S

call for equitable relief." Younger, 401 U.S. at 54 (emphasis added). A colorable double jeopardy claim is a preeminent example of one of the very few "unusual circumstances" justifying federal court intervention in a state proceeding. *Mannes v. Gillespie,* 967 F.2d 1310, 1312 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 964 (1993); *see Satter v. Leapley,* 977 F.2d 1259, 1261 (8th Cir. 1992); *Showery v. Samaniego,* 814 F.2d 200, 201 n.5 (5th Cir. 1987); *Doe v. Donovan,* 747 F.2d 42, 44 (1st Cir. 1984) (per curiam); *see also Willhauck v. Flanagan,* 448 U.S. 1323, 1325 (Brennan, Circuit Justice 1980).[10] While federal court interference

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[10] In his discussion of the appropriateness of a federal court granting a stay of state criminal proceedings, Judge Luttig cites *Divans v. California,* 439 U.S. 1367 (Rehnquist, Circuit Justice 1978). He notes that in *Divans* then-Justice Rehnquist denied an application for a stay of state criminal proceedings because the error that had prompted the decision of the state court to grant a mistrial was not intentionally caused by the prosecutor. Judge Luttig appears to assert that because there is no allegation of prosecutorial misconduct here, a stay is not warranted. As then-Justice Rehnquist's earlier opinion rejecting a prior application of a stay of Divans' state criminal proceedings makes plain, the trial judge had granted a mistrial in response to Divans' motion. *See Divans v. California,* 434 U.S. 1303 (Rehnquist, Circuit Justice 1977). When a defendant moves for and is granted a mistrial, the only circumstance in which he can properly claim that retrial following the grant of the mistrial will violate his double jeopardy right is to show that bad-faith, overreaching, or misconduct on the part of the prosecutor or the court led to the motion. *Id.* at 1303-04 (citing *United States v. Dinitz,* 424 U.S. 600, 611 (1976)). It is not surprising that then-Justice Rehnquist found the lack of prosecutorial misconduct to be dispositive of the appropriateness of a stay under those circumstances because Divans could not make a colorable showing that the retrial would violate his double jeopardy rights. In sharp contrast, because the mistrial in Petitioners' state proceedings

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who said that the blurs could be blood. Counts was no expert on blood or blood's possible appearance in a photograph. There is, however, a well recognized test – serology. The prosecution admitted this, as I read the record. The defense admitted it had not subjected the photographs to such a test. Without such a test, it could not be said with any assurance of certainty that the blurs on the photograph were blood. In the absence of such proof, it would have been highly prejudicial for the state judge to admit these photographs into evidence. The action of the state judge in finding that a mistrial was, in effect, "manifestly necessary" by the manner in which the photographs were gotten into the record is correct. I feel that this issue argues against any precipitate action in granting freedom to defendants whose guilt is so clear in a murder of gross heinousness. I dissent for these reasons.

Judge Widener joins this dissent.

WIDENER, Circuit Judge, dissenting:

While I believe the record shows the descriptions to be euphemistic as they describe the attorney's acts as inadvertent or negligent in leaving the photographs where they could be, and were, seen by the jury, and although I believe that Judge Wilkinson's traffic light should be red rather than amber, I respectfully join the dissenting opinions of Judges Russell, Wilkinson, Niemeyer and Luttig.

I note that our order grants a request to "temporarily enjoin state criminal proceedings." Although the phrase government by injunction is ordinarily used in other

context, I think our
proceeding is no less

Judge Russell join

WILKINSON, Circuit

I join Judge Lutti
write simply to expres
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petition has forced the
for no other reason th
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petition. In addition, a
this court questions w
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would have to think
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was good reason. A mistrial was granted
of the prosecution. Defense counsel does
nd that there was a hint of prosecutorial
ger v. Harris, 401 U.S. 37 (1971). A trial
g to protect nothing more than the integ-
ary admissions. That process ensures a
on is laid for the admission of evidence,
ne is duly authenticated. It serves notice
d participants in a trial of what is prop-
jury and what constitutes the record for

se counsel concededly put before the jury
had never been admitted into evidence.
been a prolonged dispute on the rele-
udicial effect of what was improperly
nsuitability of the question for federal
t this point should be apparent. The bot-
t we have undercut a state trial judge
uard the most basic rule of evidence and
ted counsel to secure the dismissal of a
tion as a result of counsel's own mistakes.

dants had been acquitted, we would have
rent case. As it is, this grant of a mistrial
erned by *Arizona v. Washington*, 434 U.S.
ch contains no less than five separate
inferior federal courts to accord respect
the difficult and discretionary decisions
al bench must face. Judge Luttig has ably
Washington decision. I am fully in accord
sion that it dictates our restraint. If the
s not red, it is at least the deepest amber,

and the en banc court has ignored every one of its cautionary signals.

Judge Russell, Judge Widener, Judge Niemeyer and Judge Luttig join this dissent.

NIEMEYER, Circuit Judge, dissenting:

I find it most unfortunate that this court has chosen to intervene and enjoin a state criminal proceeding in the circumstances of this case. This action is a bold affront to the principles of comity and federalism, and one which manifests no deference to the discretion of the state trial judge and little confidence in the ability of the state judicial system to resolve the issues. Furthermore, the majority's action mechanically imposes the Double Jeopardy Clause without taking into account the nature of the protection and the competing interests involved. I dissent from this decision.

The double jeopardy protection granted by the Fifth Amendment prohibits a second trial "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). The Supreme Court has explained, however, that a retrial *because of trial error*, as in the circumstances before us, does not violate the Double Jeopardy Clause:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant.

15. *See also Lockhart v. Nelson*, 488 U.S. 33, 40 (1988). Court has stated that the protection against affording rosecution a second opportunity to supply evidence n it failed to present initially lies "at the core of the ble Jeopardy] Clause's protections." *Tibbs v. Florida*, .S. 31, 41 (1982). The public interest in obtaining one lete prosecution to judgment for a criminal offense, ever, is also firmly protected in double jeopardy prudence. *See, e.g., Illinois v. Somerville*, 410 U.S. 458, 1973) ("[t]he interests of the public in seeing that a nal prosecution proceed to verdict . . . need not be ken by the formulation or application of rigid rules necessarily preclude the vindication of that inter-

The majority in this case determine that a mistrial red by the state trial judge before completion of the – when photographs neither offered nor admitted evidence were shown to the jury – was such an abuse ial court discretion that the petitioner's writ of as corpus must be entered now to enjoin further ecution. There can be no doubt that displaying to a photographs that have neither been offered nor been tted into evidence is trial error. It was not extraordi- therefore for the trial judge to have concluded that a rial was appropriate when the jury saw evidence that not been admitted, even though the evidence might been admissible.

Beyond circumstances where a defendant has already acquitted or might have been acquitted in the first because of the inadequacy of the government's evi- e, the Supreme Court has been reluctant to deny the the opportunity to prosecute a second trial. This is

en when the trial judge has granted a new trial too
ly or for reasons that were not entirely clear on the
d. *See Gori v. United States*, 367 U.S. 364, 366 (1961).
ri, while commenting about the trial judge's declara-
of a mistrial *sua sponte* during the direct examination
e government's fourth witness, the Supreme Court
rved, "It is unclear what reasons caused the court to
this action, which the Court of Appeals charac-
ed as 'overassiduous' and criticized as premature."
365-66. Despite that observation, the Court affirmed
etrial of the defendant, stating:

> Where, for reasons deemed compelling by the
> rial judge, who is best situated intelligently to
> make such a decision, the ends of substantial
> ustice cannot be attained without discontinuing
> he trial, a mistrial may be declared without the
> defendant's consent and even over his objection,
> and he may be retried consistently with the Fifth
> Amendment. . . . [W]e have consistently
> declined to scrutinize with sharp surveillance
> he exercise of that discretion.

368. The decision to grant a mistrial rests in the
etion of the trial judge, and so long as that discretion
t abused, the state can re-prosecute the defendant.
Supreme Court instructs that the trial judge's judg-
is entitled to "great deference" and must be
ded "the highest degree of respect." *Arizona v. Wash-*
n, 434 U.S. 497, 514, 511 (1978).

n this case I believe that the majority have substi-
their discretion for that of the trial judge to reach a
ent conclusion. That, however, is not the exercise

e jurisprudence of the Double Jeop-
we can conclude, while according
the highest degree of respect to the
abused his discretion in granting a
llow the countervailing public inter-
e state to bring the defendant to
en core evidence, depicting blood at
impermissibly presented to the jury
s never offered nor admitted into
nclude that the trial judge could not
ter declare a mistrial. By substitut-
r that of the trial judge, the majority
ability of the prosecution to bring to
charged with murder. The double
does not reach so far. I therefore
e dissenting opinions of Judge Wilk-
tig.

dge Widener, Judge Wilkinson and
s dissent.

ge, dissenting:

nary decision, this court has just
of three defendants charged with
, literally while the jury is hearing

majority has thrust itself into the
of South Carolina in disregard of
U.S. 37 (1971), and has, in violation
d of *Arizona v. Washington*, 434 U.S.
d its view for that of the state trial

urts on the quintessential discre-
er unadmitted crime scene photo-
placed before the jury *by defense*
mistrial. Except possibly for the
court who heard argument on the
and one-half hours on Saturday
of the *en banc* court has, to my
an opportunity to see the photo-
now finds as a matter of fact were
the overall context of this trial that
of mistrial was irrational.

ecision, I am unaware of even a
unger in which a federal court of
ate criminal trial in progress on the
opardy claim, much less reversed a
deral district court in order to do
staying an ongoing state criminal
one that is merely pending) is a
of the federal judicial power, it
hat that power should not be exer-
there is no suggestion of pros-
sconduct, the error was committed
d, as found by both the state trial
district court, the inadvertent sub-
raphs to the jury raises a distinct
. If under any circumstances, then
. *Harris* and *Arizona v. Washington*
be struck in favor of deference to
arolina and its courts, and that
le double jeopardy violation await
w on direct and *habeas* appeal from
tter disruptive effect of this court's

intercessions in this state
is already evident. Not o
time been consumed wit
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tion, recused himself fro
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is imperative if there is to
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The facts that promp
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On December 5, 199
and other charges began
State presented the testin
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stated that it had no o
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sel stated that the defen
photographs. After Cou
court recessed for lunch

Upon returning fro
ered that defense couns

ver the past week
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' trial for murder
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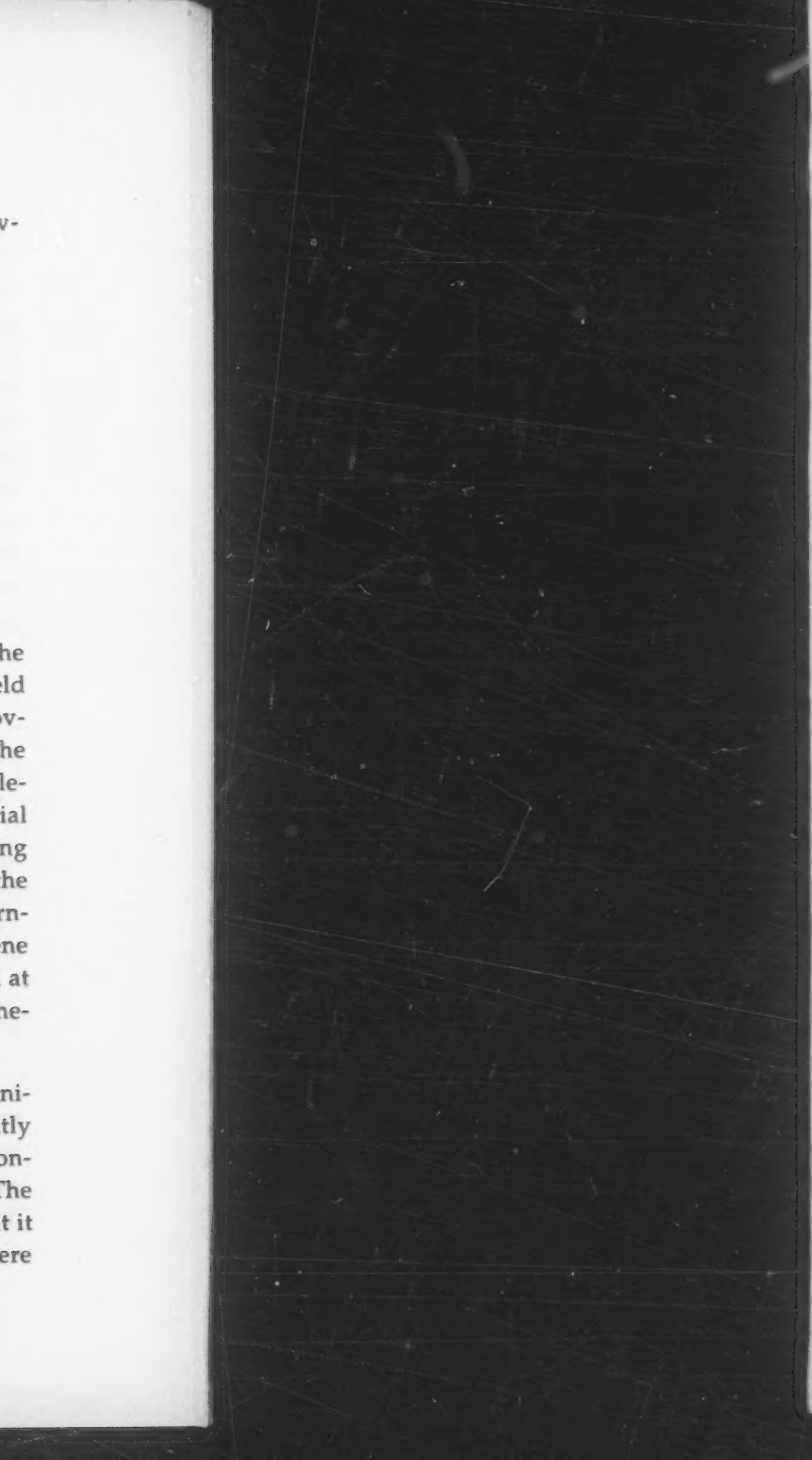
on the specific grounds of possible prejuc
ernment. The court found:

> [I]ssues of provocation and self-defen
> ent in this case. One factor that is in
> resolving these issues is whether
> Defendants was on decedent's prop
> the public roadway at the time h
> weapon. The disputed photographs a
> photographs of the ground which s
> stains. Because of this, they could
> more clearly document where th
> occurred.

Id. at 5.

The defendants appealed this order t
Fourth Circuit. On Saturday, July 15, 1995
a two and one-half hour hearing at whic
ernment and defense counsel candidly
panel's questions. During this argument,
ness of the district court's decision to
became even more apparent. Upon poin
from the panel, defense counsel all but c
unadmitted photographs were prejudicia
ment's case because they are close-ups of
which, due to the visibility of what appea
the particular location depicted, support
ory of self-defense or provocation.

In response to the panel's question
tially said that the photographs were
prejudicial." But as became clear upon f
ing, the State had misunderstood the init
State explained in response to a follow-u
meant by its earlier response that the p



of no moment, since the ultimate determination of admissibility rests with the trial judge and must be made with an appreciation of the whole trial and whether the photographs would be unduly prejudicial. The parties simply are not in a position to know whether the photographs would have been admissible. The trial judge, both immediately prior to declaring a mistrial and in his later decision rejecting the defendants' double jeopardy claims, specifically noted his concerns about the admissibility of the evidence and the need to make a determination of admissibility contemporaneously with the offering of evidence.

Finally, defense counsel maintained that any prejudice could have been cured by limiting instructions from the court to the jury. This is the identical argument that was made in *Arizona*, and, as the Court there held, although some trial courts might choose that route, that alternative is not mandated and a trial court's decision to declare a mistrial instead must be accorded "the highest degree of respect." 434 U.S. at 511. The state trial court quite reasonably could have concluded, and undoubtedly did, that if the jury saw the photographs before the foundation testimony for their admission, it might be predisposed to misinterpret them. Or the court could have decided that the jury might disregard any attempted curative instructions and simply believe their own interpretations of the photographs. As *Arizona* held, that decision is for the trial court to make and not for us to second-guess.

Accordingly, the panel voted to affirm the district court and deny the stay.

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court finding by a federal court on *habeas* review following conviction, *and a fortiori on extraordinary motion during the actual trial of the case in state court.*

Arizona stressed that "there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury." 434 U.S. at 509. Significantly as it bears upon the error committed by the majority in the instant case, the Court explained:

> [T]he extent of the possible bias cannot be measured, and . . . the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice *requires* that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

Id. at 511 (emphasis added). The Court went on to hold specifically that the absence of a finding of "manifest necessity," the failure to articulate the reasons for the mistrial, and the failure to consider alternatives to mistrial explicitly, did not render the trial court's mistrial order invalid, *id.* at 501-03, 516, and that the essential inquiry, rather, is whether the trial court acted "irrationally or irresponsibly" in granting the mistrial, *id.* at 514-15.

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Court held in *Arizona*, where the preju-
r opening statements by defense coun-
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terms of the capacity for meaningful
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l courts for such fact-intensive deter-
ace of this clear holding, we should at
ain from engaging in the kind of fact-
by the majority in the course of find-
court may have acted irrationally in
l.

III.

es of *Arizona v. Washington* were not
require that we stay our hand in this
unmistakable command of *Younger v.*
Younger v. Harris announced a bedrock
ent "extraordinary circumstances," fed-
not enjoin pending state criminal pro-
at 53-54. *Younger* is not simply an

that the State, in a technical sense, can
prohibition. *Cf. Swisher v. Brady*, 438 U.S
exercising discretion to decline to consider
ause the State voluntarily submitted to the
y event, in this case the State emphatically
issue. Resp'ts-Appellees Resp. to Mot. for
rks v. Garrison[, 446 F.Supp. 649 (M.D. N.C.
1310 (4th Cir. 1979) (denying request for
in a state criminal proceeding on *Younger*
ordinary circumstances justifying federal
state criminal proceedings have not been

interesting exhortation; it is grounded in "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law" and, more importantly, it is grounded in considerations of comity, "born of . . . Federalism." *Id.* at 43-45. Since *Younger*, the principle of judicial abstention has been extended to include state civil litigation, *see, e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), and even state administrative proceedings, *see, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986). But this case does not implicate either of these extensions. This case rests at the very core of the original *Younger* holding – a federal appellate court stay of an ongoing state criminal proceeding.

The majority believes – despite the contrary conclusion in *Younger* – that such a stay is appropriate. Some federal courts admittedly have held, usually obliquely, that double jeopardy challenges can be exempt from the prohibition of *Younger*.[13] But these cases generally

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[13] *See, e.g., Gully v. Kunzman*, 592 F.2d 283, 286-87 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979); *Jackson v. Justices of Superior Court of Mass.*, 549 F.2d 215, 216 n.1 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977); *Foster v. Murphy*, 686 F.Supp. 471, 474 (S.D.N.Y. 1988). *But see Rasmussen v. White*, 502 F.Supp. 237, 240 (E.D. Tex. 1980) ("The mandate of Younger is broad and clear; federal courts are not to interfere with pending state criminal actions absent a strong showing of bad faith, harassment, or other extraordinary circumstances. The mere fact that a petitioner

ss claims of prosecutorial misconduct. Regardless of visdom in that context, in the instant case there is egation of prosecutorial misconduct or bad faith. istrial was brought about by defense counsel's own ertence.

nat the prophylactic shield of the "manifest neces- doctrine is unnecessary where, as here, the primary r of prosecutorial misconduct and manipulation seeks to prevent is already absent, is brought into relief by *Divans v. California*, 439 U.S. 1367 (Rehn- Circuit Justice 1978). In *Divans*, then-Justice Rehn- denied a motion to stay a criminal proceeding se there was no allegation of bad faith and the *ution's* "error resulting in the court's mistrial decla- was not intentionally committed by the prosecu- for the purpose of provoking applicant's mistrial st." *Id.* at 1367. If the fact that the precipitating error ne prosecution was not committed in bad faith is minative for denying a stay of a criminal proceed- hen surely the fact in the instant case that the error not the prosecution's at all – but was the defendants' ould be similarly decisive. This is precisely the kind

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a double jeopardy claim does not, by itself, raise the cation that the prosecution is conducted in bad faith to s the petitioner, or that extraordinary circumstances are nt."); *Evans v. Court of Common Pleas*, 1990 WL 223071, at E.D. Pa. 1990) ("[T]his Court holds that a claim of double rdy, without more, is insufficient to overcome principles of alism which dictate respect for the authority and ability of courts to protect constitutional rights in the first nce."), *aff'd* 959 F.2d 1227 (3d Cir. 1992), *cert. dismissed*, 113 . 1071 (1993).

on contemplated in *Wade v. Hunter*, 336 U.S. 684,
), when the Court observed that, "a defendant's
ght to have his trial completed by a particular
must in some instances be subordinated to the
interest in fair trials designed to end in just
ts."

IV.

n the express findings of prejudice by both the
l court and federal district court, and the obvious
ss of these judgments when measured against an
-discretion standard, a federal appellate court
usiness injecting itself on this issue mid-trial,
y given that there is no suggestion of misconduct
rosecution or the court and the error is conceded
at of the defense. Given the deference we are
to accord the state judicial process under *Younger*
s, our assumption of power is all the more
ed.

ottom, the majority simply disagrees with the
urt's assessment of the prejudice caused by
counsel's mistake in placing the unadmitted pho-
s before the jury. However, whether the trial court
rect, or whether we would have done it differ-
e not the proper questions, as *Arizona* makes
he interest in orderly, impartial procedure would
ired if [trial courts] were deterred from exercising
ower [to declare mistrials in appropriate cases]
ncern that any time a reviewing court disagreed
e court's] assessment of the trial situation a retrial
automatically be barred." 434 U.S. at 513. The

trial court's action was irrational
en defense counsel was forced to
this, it most assuredly was not.

r no illusion but that the court's
e criminal trial, unless vacated on
r the full release – without even a
als that have been charged by the
offenses of murder and lynching.
re this injustice, and indeed, for-

ge Widener, Judge Wilkinson, and
is dissent.

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on of this opinion was released on
ong with this court's order staying
inal trial. I do not hereby amend
f my opinion, in which a number
because I do not believe it appro-
district court has proceeded upon
y here on my own behalf to record
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riday, the federal district court
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Shortly before midnight, the dis-
t of *habeas corpus*, barring the trial
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court explaining its decision.

hat decision, the state trial court,
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court denied that stay, the State
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IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF SOUTH CA
COLUMBIA DIVISION

Wayland Gilliam, Jr.,

Petitioner,

v.

James Lee Foster, Sheriff of Newberry County, Charles M. Condon, Attorney General of South Carolina, and James W. Johnson, Jr., Circuit Court Judge of South Carolina,

Respondents.

James Matthew Swain,

Petitioner,

v.

James Lee Foster, Sheriff of Newberry County, Charles M. Condon, Attorney General of South Carolina, and James W. Johnson, Jr., Circuit Court Judge of South Carolina,

Respondents.

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that were not presented to the Magistrate Judge, the court would decline to accept the recommendation and would not issue the injunction. Because of the likelihood of an appeal of the court's decision, this order is being entered to memorialize the ruling made at the conclusion of the hearing on July 10.

The Petitioners seek a writ of habeas corpus, asserting in their petitions that the state is seeking to retry the defendants in violation of their right not to be placed in jeopardy twice for the same offenses as guaranteed by the Fifth Amendment to the United States Constitution.

The record reflects that the Petitioners were tried before the Honorable James W. Johnson, Jr., in the Court of General Sessions for Newberry County beginning on December 5, 1994. The incident that gave rise to the charges occurred on January 4, 1993. The indictment charges all three Defendants with murder and lynching. In addition, Defendant Swain is charged with assault with intent to kill, and Defendant Gilliam is charged with indecent exposure.

On either the second or third day of trial (the exact date is not clear from the record that has been produced to this court) a mistrial was declared upon motion of the state. All Defendants opposed the motion. On March 6, 1995, as the state was preparing to retry the Defendants, all Defendants filed a motion to dismiss the indictment and to bar further prosecution based upon the Double Jeopardy Clause of the Fifth Amendment. The state circuit judge held an evidentiary hearing and heard oral argument from counsel. He thereafter entered an order denying the motion to dismiss the case. The Defendant

denying the motion to dismiss the second trial on double jeopardy grounds, the state circuit court implicitly found that one of the defense attorneys was responsible for the commingling of the photographs. The state circuit court did not ascribe any improper motive to the acts of defense counsel, but nevertheless concluded that it was the Defendants, rather than the state, that had caused the jury to see photographs that were not in evidence.

The United States Magistrate Judge who reviewed these cases has done his usual fine job of thoroughly canvassing the record and reporting the facts and legal principles involved to this court. The Report and Recommendation acknowledges and thoroughly analyzes the four factors this court must address in deciding whether or not to grant injunctive relief. *See Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991). The Magistrate Judge also correctly recognizes that where, as here, a defendant raises a double jeopardy issue, federal courts should carefully inquire as to whether the constitutional prohibition on double jeopardy is being violated, because the right is broad enough to include a prohibition on requiring a defendant to go to the inconvenience and expense of defending himself in a second trial where a mistrial was improvidently granted in the first trial. The Magistrate Judge also recognizes that, although federal courts have the authority to intrude into the state criminal machinery in appropriate circumstances, "it is still a grave matter for a federal judge to enjoin a state criminal trial. The power exists but it should be exercised sparingly." *United States ex. rel. Stevens v. Circuit Court of Milwaukee County, Wi.*, 675 F.2d 946-47 (7th Cir. 1982). With these principles in mind, the

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issue brought out at the July 10 hearing que South Carolina procedural rule that al defendant who offers no evidence to rgument to the jury. As part of the com- uth Carolina, a defendant who offers no r her case in chief is permitted to make nent, a right viewed by many criminal especially important in defending crimi-

ow argues that the Defendants, by allow- ographs to be viewed by the jury might vidence before the jury through the "back the same time preserving the right to argument at the conclusion of the trial.

ants argued that they had already, as part xamination of Mr. Counts and other of the s, offered evidence of their own and thus feited the right to make the last argument. ointed out by the Solicitor at oral argu- es in South Carolina have not been consis- erpretation of the rule in this respect. The sted that some judges are of the opinion ndants who fail to offer any evidence, as ate's case or in their case in chief, are t argument to the jury. Other judges take a e view and allow the last argument to be lefendant who does not call any witnesses efense. This court's recollection of its own

experiences as a practicing attorney in South Carolina confirms the Solicitor's assertion that state court judges have not been consistent in their interpretation of the rule.

At oral argument, defense counsel strongly resisted the argument that it was one of the attorneys for the defendants who allowed the disputed photographs to be commingled with those that were in evidence. They also argue that the state court judge made no express finding that this occurred. However, a thorough reading of the state trial judge's opinion in this regard yields the inescapable conclusion that it was defense counsel who committed the error.

These two new factors cause the court to overrule the Report and Recommendation of the Magistrate Judge and decline to grant injunctive relief in this case. The Magistrate Judge's findings and recommendations regarding the balancing of the hardship to the Petitioners if the motion is denied against the harm to the Respondents if the motion is granted are all sound and are incorporated herein by reference. The Magistrate Judge's conclusions regarding the fourth factor – that of the public interest – are also supported by the record and are incorporated herein by reference. With regard to the third factor, however – that of likelihood of success on the merits – the court disagrees with the Magistrate Judge and concludes that the Petitioners have virtually no likelihood of success on the merits of their double jeopardy claim for the reasons announced in this opinion. Accordingly, the

and Recommendation is not accepted by this court
motion for injunctive relief is denied.

IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States
District Judge

1995
ia, South Carolina

N THE UNITED STATES DISTRICT COURT
OR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Wayland Gilliam, Jr., Petitioner, -sus- Lee Foster, Sheriff of ry County; Charles M. , Attorney General of e of South Carolina; and . Johnson, Circuit Court f South Carolina, Respondents.	C. A. No. 2:95-1742-17AJ
Owings, Petitioner -sus- Lee Foster, Sheriff of ry County; Charles M. , Attorney General of e of South Carolina; and . Johnson, Circuit Court f South Carolina, Respondents.	C. A. No. 2:95-1743-17AJ

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pp. 244

granting injunctive relief are
l [sic], Ltd. v. Breakthrough Medi-
811 (4th Cir.1991), the Fourth
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F.2d 283, 286-87 (6th Cir. 1979), and
therein, at 287 n. 8; *Drayton v. Haye*
117, 120-21 (2nd Cir. 1979). One of th
interests that the double jeopardy
tects is the interest in not being trie
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United States, 355 U.S. 184, 187-88, 78
223, 2 L.Ed.2d 199 (1957), which is di
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for the same offense is a violation of
jeopardy clause that is not cured by
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is concerned, the relevant state re
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has nowhere else to turn in the st
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Yet it is still a grave matter fo
judge to enjoin a state criminal trial.
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the trial is currently scheduled to begin on July 17, 1995 and that if the matter is stayed and the petitioners are unsuccessful in their habeas petition and an appellate court does not extend the stay, the next term at which the case could be tried would be in August, 1995. However, if the petitioners are successful and an appeal ensues, the trial of the case may be delayed as much as a year.

The original trial of the petitioners commenced in November, 1994, less than one year ago. Even if this trial were delayed for an entire year, it would still be less than two years from the original trial. Such a delay is not to be depreciated, and given the frailty of this mortal realm the possibility is real that witnesses available today will not be available one year from now. However, the respondents have presented nothing to indicate that such a delay would be likely to harm the respondents[1] or that steps may not be taken to reduce the likelihood of harm. On the other hand, as already outlined, a failure to delay the prosecution would do irreparable harm to the petitioners' rights. Any balancing of the harm done in this instance tilts decidedly in favor of granting the petitioners' request for injunctive relief.

Third, since the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary

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[1] The only reason given by the respondents for delaying the July 17th trial is that "[t]he prosecution has advised below signed counsel of the desire to proceed forward after consulting with the desires of the victims' survivors in accordance with the South Carolina Victims Bill of Rights, § 16-3-1350(F)(3) and the law enforcement agency. (Sic)

numbers 9, 10, 11, 15, 17, 18 and 19, were never offered or placed into evidence.[2] Nevertheless, apparently through the negligence of one of the defense counsel, all of the photographs were left within reach of the jury.

After Captain Counts testified it was brought to the court's attention that the photographs which had not been admitted had been commingled with the photographs properly admitted into evidence and presented to the jury. The prosecutor placed the blame squarely on the defense team and moved for a mistrial. The defense vigorously opposed the mistrial.

The trial court did not acknowledge the defense's intent to recall Captain Counts to introduce the pictures, made no decision on the admissibility of the photographs, made no finding as to prejudice, questioned the foreman of the jury only about whether the entire jury had seen the pictures in general and gave no curative instruction. Thereafter the court declared a mistrial.

In a subsequent written order in response to the petitioners' motion of dismissal on double jeopardy grounds, the trial judge explained that he was concerned because of the nature of the exhibits and the extent of publication of the exhibits to the jury that no curative instruction could be issued. (Order p. 4) He further explained that Rule of Evidence 403 authorized relevant evidence to be excluded if prejudice outweighed probative value, but he "could not foresee if the questioned photographs would have been offered and, if offered,

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[2] The pictures not introduced into evidence are attached to the petition herein.

then admitted into
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v. Perez, 22 U.S. 57
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sented in each case. See *United States v.* 973, 975 (4th Cir. 1984) (manifest neces- pplied in a mechanical fashion).

cord before the court does not explain ch as whether the wayward pictures were ther party[3] or why admitting the photo- recalling Captain Counts or otherwise equate alternative to aborting the trial. to the merits and are so serious, substan- d doubtful, as to make them fair ground nd thus more deliberate investigation. third factor in deciding the request for eighs heavily in favor of granting the

court must evaluate whether the public granting preliminary relief.

ourt concluded that the public had an ir trial that is designed to end in a just" and indicated that the public interest rved by granting the petitioners' double . (Order p. 6) By brief the respondents lic interest is not served by delay of the secutions of three (3) individuals where a probable cause determination to have nt crimes. The cost and expense to the

fathom why pictures taken by state agents of om a different angle from those admitted into e prejudicial to the state and justify granting a osecution for a mistrial over the defendants'

taxpayers of a trial is a matter that the system will bear." (Respondents brief p.10)

On the other hand, there are a number of public interest reasons for adequately resolving the double jeopardy issues raised before proceeding further that do not necessarily conflict with the public interests cited by the respondents here. The Supreme Court has enumerated several such interests: (1) to ensure the finality of judgments in criminal cases; (2) to avoid compelling a defendant to live in a constant state of anxiety and insecurity attendant with successive prosecutions for the same offense; (3) to avoid giving the prosecution an unfair opportunity to retry the defendant using information gained from the first trial concerning the strengths and weaknesses of the State's case; (4) to ensure that the defendant's right to have his fate decided by the first jury empaneled; and (5) to avoid the imposition of multiple punishments for the same offense. *United States v. DiFrancesco*, 449 U.S. 117, 127-29, 101 S.Ct. 426 (1980); *United States v. Crotwell*, 896 F.2d 437 (10th Cir. 1990). See also *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221 (1957).

Here, it appears that the public interest in proceeding with this prosecution without delay on July 17, 1995, does not outweigh the interest in having a fair trial that ends in a just judgment which may be regarded as final. Nor does it outweigh the need to keep checks on the ability of the state to use its power to unfairly engage in multiple prosecutions and the need to prevent multiple punishments of citizens. Finally, despite the cavalier assertions of the state, the expense of taxpayers' money is not

without significance and must be counted on the side of delaying this prosecution.

Therefore, finding that the petitioners meet the requirements for obtaining injunctive relief, it is recommended that this court enter its order temporarily enjoining the criminal prosecution of the petitioners. Further it is recommended that the court provide for the expeditious filing of a return to the habeas corpus petition and for prompt hearings so that if this prosecution is to go forward it is not unduly delayed.

Respectfully Submitted,

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate Judge

July 7, 1995
Charleston, South Carolina

The Supreme Court of South Carolina

The State,

Respondent,

v.

James Swain, Wayland Gilliam, Jr. and Pamela Owings,

Appellants.

ORDER

This is an appeal of an order which refused to dismiss the charges against the appellants based on double jeopardy. The appeal is dismissed without prejudice because the order is not immediately appealable. *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986); *State v. Parker*, 267 S.C. 317, 227 S.E.2d 677 (1976).

IT IS SO ORDERED

/s/ James E. Moore A.J.
FOR THE COURT

Columbia, South Carolina

May 31, 1995

STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY The State, vs. James Swain, Wayland Gilliam, Jr. and Pamela Owings, Defendants.	)	THE COURT OF GENERAL SESSIONS EIGHTH JUDICIAL CIRCUIT CASE NO.: AMENDED ORDER

This matter comes before me on the motion of attorneys for the three defendants captioned above, James Swain, Wayland Gilliam, Jr. and Pamela Owings. The Defendants have moved this Court pursuant to the prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution and Article 1, Section 12, of the South Carolina Constitution, to dismiss the charges pressed against them in the General Sessions Court of Newberry County. All three defendants are charged with Murder and Lynching in the First Degree. Additionally, Defendant Swain, alone, is charged with Assault with Intent to Kill, and Defendant Gilliam, alone, is charged with Indecent Exposure. All of these indictments arise out of the same factual setting. Indictment 93-GS-36-70 charges Murder, Lynching and Assault with Intent to Kill and Indictment 93-GS-36-183 charges Indecent Exposure. This Court held a hearing on Tuesday, April 11, 1995, wherein counsel for the defendants and the state were present and argued their respective positions in this matter.

It must be noted at the outset that the State moved for a mistrial only after this Court brought certain matters

to the attention of the parties. More specifically, this Court observed that certain physical items, namely photographs of the murder scene, had been taken by the jury and reviewed by each of the jurors without these photographs being admitted into evidence. The Defendants' argument notwithstanding, it is of no consequence whether the Defendants either inadvertently, intentionally or mistakenly allowed this activity to occur. The principle remains the same: Exhibits that had not been introduced into evidence were in fact given to the jury for their review without proper documentation and prior to being finally passed on by this Court before being admitted into evidence.

The South Carolina Supreme Court in *State v. Alexander,* 303 S.C. 377, 401 S.E.2d 146 (1991) adopted Federal Rule of Evidence 403 which provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." This Court was never given the opportunity to make a determination pursuant to Rule 403 on the admissibility of the questioned photographs because of the actions of defense counsel. Counsel for one of the three defendants has acknowledged that it was possibly his action that allowed such an occurrence. "Now that was certainly sloppy housekeeping and I take responsibility for that, but that was certainly not a tactical move to put anything before the jury." (Transcript at Page 41). In the same way that a Motion *In Limine* does not ultimately decide the admissibility of evidence because of changed circumstances occurring during a trial, *State v. Flood,* 295

S.C. 518, 369 S.E.2d 842 (1988), this Court could not foresee if the questioned photographs would have been offered and, if offered, then admitted into evidence. Contrast the Court's remarks on page 12 line 25 through page 13 line 4 with the Court's comments on page 46 lines 6-9 of the Transcript "And I don't know of anyway at this point in time, even if they were later offered and admitted, at this point in time I have no way of guessing that".

This Court is under an obligation to provide a fair and just trial for both the defendants and for the state. (See Transcript at page 46). This Court was left with the dilemma as to how to proceed after it was brought to its attention that evidence had been published to the jury that had not been properly admitted. It concerned this Court to the extent that it was brought to the attention of the litigants for a hearing as to how best then to proceed.

The Defendants argue that this Court did not consider any other reasonable alternative except to grant the State's Mistrial Motion after the publication to the jury of the questioned photographs. To the contrary, recognizing that the jury in this case had been empaneled for little over a day, the Court considered reasonable alternatives by calling out the jury foreman and inquiring with him in open court as to the extent of the publication of the questioned photographs. As noted on Transcript page 43 at line 9 the Court brought out the foreman of the jury, Mr. William C. Cunningham, and queried him as to what had been observed by himself as well as other members of the jury. Mr. Cunningham acknowledged that all the photographs had been circulated throughout the jury.

Mr. Cunningham: "Yes Sir, to my knowledge they all had."

The Court: "All right, Sir. To your knowledge, all of them had as far as you know?"

Mr. Cunningham: "Yes Sir. As far as I know."

The Court: "All right, Sir. That is what I needed to know. You can step back into the jury room."

Transcript page 44 lines 3 through 7.

Further, the Court then inquired of the court reporter whether or not the Court's understanding of the extent of the publicity was in fact accurate. (See Transcript at page 45). The court reporter confirmed by responding "Yes Sir. It was a big stack. Those were included in the group that were over there." (Transcript page 45, lines 4-5) It was the Court's feeling that because of the nature of the exhibits and the extent of the publication to the jury that no curative instruction could be issued. This Court's concern about a curative instruction is implicitly reflected in the Transcript at page 46 lines 6-9. Unlike the Court in *United States v. Sloan*, 36 F. 3d 386 (4th Cir. 1994) a case cited by the defendants as supporting their position, this Court *did* consider the alternative of a curative instruction. It was this Court's decision at the time, however, that a curative instruction would simply highlight and compound the error already existent.

The Court did not engage in any *sua sponte* determination of a mistrial, see *State v. Prince*, ___ S.C. ___, 301 S.E.2d 401 (1983) but rather, allowed all counsel in this matter "full opportunity to explain their positions". (Transcript page 45, lines 9-11). It was of grave concern to

this Court that this prejudicial occurrence had transpired and this Court wished to hear from each of defendants' counsel as to their feelings before ruling on the Motion for a Mistrial. See Transcript pages 39-41. At no time did any counsel for the defendants ask for more opportunity to be heard or to review other legal precedent prior to this Court's ruling.

"When a mistrial is declared over a criminal defendant's objection, retrial is permitted only when 'there is a manifest necessity for the act or the ends of public justice would otherwise be defeated.' " *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824) as cited in *United States v. Sloan, supra*. The *Sloan* court noted that this bedrock principle has been reiterated and followed consistently in the intervening 171 years. See, e.g., *Arizona v. Washington*, 434 U.S. 497, *Illinois v. Somerville*, 410 U.S. 458 (1973) and *United States v. Jorn*, 400 U.S. 470 (1971). As noted by the *Somerville* court, a trial judge has "broad discretion" in determining whether manifest necessity requires declaration of a mistrial. While this Court "need not make an explicit finding of manifest necessity" *Sloan, id.* at 394, citing *Arizona v. Washington, id.*, the transcript adequately reflects that the court was so concerned with the original of the prejudice as well as the extent of the publication to the jury that an implicit finding of manifest necessity exists. A "manifest necessity" standard cannot be "applied mechanically" *Jorn*, 400 U.S. at 485 and this Court declines to conclude that it acted "irrationally or irresponsibly", *Arizona v. Washington*, 434 U.S. at 514, in making its decision to grant a mistrial. "Each case must turn on its facts", *United States v. Sartori*, 730 F.2d 973, 976 (4th Cir. 1984).

The twelve jurors had seen and touched physical evidence not properly admitted. While the defendants claim that photographs would have been introduced later, this is speculative and conjectural. This was not merely an opening statement by an adversary that could have been cured by an instruction of this Court as was the case in *United States v. Sloan, id.* Moreover, Defendants have not produced a case where a mistrial was declared improvidently granted when inadmissible evidence by way of photographs had been published to the jury.

Moreover, it is more than "manifest necessity" which requires the granting of a mistrial in this case. The public interest in and its right to a fair trial that is designed to end in a just judgment further requires that this Court deny the Defendants' Motion to Dismiss under the Fifth Amendment. It would be unfair, unjust and improper under these circumstances, which may have come about as a direct result of actions of defense counsel, to reward the defendants by granting their Motion to Dismiss. "The interest of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude that vindication of that interest" *Illinois v. Somerville,* 410 U.S. at 463, 93 S.C. at 1070. The Court's broad discretion was exercised under the facts existent and a mistrial was, of necessity, declared.

"Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing a trial, a mistrial may be declared without the defendant's consent and even over

his objection, and he may be retired consistently with the Fifth Amendment." *State v. Gamble*, ___ S.C. ___, 272 S.E.2d 796 (1980) quoting *Gori v. United States*, 367 U.S. 364, 368, 81 S.C. 1523, 1526, 6 L.Ed.2d 901 (1961). This Court will not second guess itself now, four months later, by what it observed, heard and felt at the time of its initial ruling.

The Defendants' Motion to Dismiss the Indictments and to prosecution on the ground of double jeopardy is denied.

AND IT IS SO ORDERED.

/s/ James W. Johnson, Jr.
James W. Johnson, Jr.
Judge Eighth Judicial Circuit

Laurens, South Carolina
May 15, 1995

[p. 39] MS. STROM: Your Honor, based upon the situation brought to light by His Honor regarding this photographs, #9, 10, 11, 15, 17, 18 and 19 –

THE COURT: Give me those numbers again.

MS. STROM: 9, 10, 11, 15, 17, 18 and 19. They were premarked. Your Honor, it is my recollection from looking at my notes and discussing with co-counsel, these were not admitted into evidence. Your Honor, they were placed upon the railing of the jury box. I was just informed, Your Honor, by Major Hunter of the Newberry County Sheriff's Department that he saw the jurors looking at pictures and placed a stack of pictures on the corner of the bar of the jury box. Basically what we have, Your Honor, is defense counsel has placed into the jury's – has placed something that is easily accessible, has been accessible by the jury, which is not in evidence. They have seen something that has not been admitted into evidence, and that is improper. Your Honor, at this time, the State would move for a mistrial.

THE COURT: All right. Ms. Goodwin.

MS. GOODWIN: May it please the Court. Your Honor, I certainly take exception to Ms. Strom's presumption that it was the defense that put those [p. 40] pictures over on the bar. Counsel have all discussed this, none of us – we are all officers of this court. None of us has any recollection of placing those photographs over there. It could just as well have been somebody from the State or the witness or somebody else. I don't think anybody really knows how they got there, but it is certainly unfair to presume that it was the defense that put it over there.

The witness did testify about those pictures and identified them. We will recall him and move them into evidence any way. I think certainly there is no grounds for a mistrial.

THE COURT: Mr. Mills.

MR. MILLS: As to Major Hunter, I don't know who Major Hunter is, where he goes or what position he was in and I don't know if he was looking over anybody's shoulder. I think obviously the jury is the only one who could answer that question. If he could identify that this was the picture – who is Major Hunter?

THE COURT: This is Major Hunter standing in the grand jury box over here.

MR. MILLS: If he can identify which pictures they were looking at, and if he is willing to swear under oath that those are the ones that were looked at. I mean that is the only question I would have regarding that. I would reiterate and take exception, as Ms. Goodwin did, [p. 41] to the implication that somehow this was a defense tactic. I also point out to the Court that State's exhibit number 5 shows all of those, the same photograph from a different angle, which of course has been admitted and seen by the jury.

THE COURT: Mr. Price, do you want to add anything?

MR. MILLS: Just to the extent that if they did see them, I fail to see any prejudice and, as this Court is well aware, this case is two years in the waiting and an enormous amount of preparation has gone into it and we

have been in this case already three days now. And it looks like many to go.

THE COURT: All right. Mr. Price.

MR. PRICE: If it please the Court, at this time we would resist a motion for mistrial. I was the attorney who gathered those photographs and presented them to Mr. Counts. My recollection is the ones that were not moved into evidence by Ms. Goodwin were left there at the witness stand. Now, that was certainly sloppy housekeeping and I take responsibility for that, but that was certainly not a tactical move to put anything before the jury. And I have no recollection of myself or anyone else in the courtroom bringing them before the jury.

[p. 42] THE COURT: Ms. Strom?

MS. STROM: Just briefly, Your Honor. Whether it was an intentional act or an inadvertent act, we all have a duty to make sure there is no evidence accessible to that jury that is not admitted into evidence. This is a very serious matter, and the State strenuously requests a mistrial.

MS. GOODWIN: I beg the Court's indulgence.

MR. PRICE: May it please the Court, I want to make sure it is on the record that I object to a mistrial on behalf of my client.

THE COURT: I think that is already on the record. I need to clarify the record, because we had a conference here at the bench that I am not sure was in the record. When we came back after lunch the Court advised counsel that after recessing for lunch that the court reporter, in reviewing all of the documents that had been

admitted into evidence, got all of the exhibits form the bar which is in front of the jury box, a part of the jury box, and checked those against her list to make sure that she had everything. In going through that list she discovered seven photographs marked as Defense Exhibits 9, 10, 11, 15, 17, 18 and 19, which according to her records had not been admitted into evidence. I brought that to counsels' attention. We took a recess for the various attorneys to [p. 43] conference and to discuss that matter. That may have been clear from what has already been stated by counsel on the record, but in case it is not I wanted to be sure that that was reflected.

Prior to ruling on the State's motion I am going to call the foreman out and talk with him, of course, in your presence for just a moment. I need to ask him some questions. Bring the foreman of the jury out please.

(Foreman of the jury, Mr. William C. Cunningham, Jr., was brought into the courtroom.)

THE COURT: Mr. Cunningham, you can just stand right there or you can have a seat. Where ever you are most comfortable. I need to ask you a few questions as the foreman of the jury. You will recall that earlier today that one of the attorneys had asked permission to publish certain exhibits to the jury, and I told him that would be fine, that would be appropriate. And throughout the trial exhibits have been offered, they have been placed right in front of you and they have been distributed through the jury.

MR. CUNNINGHAM: Yes, sir.

THE COURT: There were a number of photographs that were admitted into evidence and have been passed throughout the jury. When we broke for lunch the photographs were put in a stack and left on the bench [p. 44] right in front of you. To your knowledge, had all of those photographs been circulated through the jury?

MR. CUNNINGHAM: Yes, sir. To my knowledge they all had.

THE COURT: All right, sir. To your knowledge, all of them had as far as you know?

MR. CUNNINGHAM: Yes, sir. As far as I know.

THE COURT: All right, sir. That is what I needed to know. You can step back into the jury room.

MR. MILLS: Your Honor?

THE COURT: Yes, sir?

MR. MILLS: Would it –

THE COURT: I am not going to allow you to question the juror.

MR. MILLS: I was going to ask the Court to make inquiry.

THE COURT: Well, he can go on back in and we can talk about it.

(Mr. Cunningham left the courtroom.)

MS. GOODWIN: Your Honor, could I just make a clarification. Maybe I misunderstood. I thought only

these photographs were put over there or all of these photographs?

THE COURT: All of the photographs is my understanding. Madam Reporter, you clarify if I am [p. 45] wrong. My understanding was that – well, you tell me, Madam Reporter, which photographs were over here. Was it more than these?

COURT REPORTER: Yes, sir. It was a big stack. Those were included in the group that were over there.

THE COURT: There was more than just these. A stack in which these were included is what the reporter found when she gathered up the exhibits.

All right. Mr. Mills, I will be glad to hear – I want to hear everybody fully on this issue before I make a decision.

MR. MILLS: I understand. When the Court phrased the question, whether the exhibits were looked at, of course, those specific photographs were not identified to the juror to make sure they were included in the group that he talked about. Maybe that was implicit, maybe it's not. I think we need to clear that up.

THE COURT: I wasn't going to ask the foreman to try to describe what pictures and what pictures were not. I knew that the pictures that are not in evidence were sitting on the rail in front of the foreman. And that is why my question was phrased whether the pictures on the rail in front of the foreman had all been circulated to the jury, and he said to his knowledge they had been. Based on his response, and of course this Court – one of [p. 46] my primary functions is to ensure both a fair trial and a

proper trial, I don't think I have much choice but to grant the motion for a mistrial, because it is clear that photographs which are not in evidence, had not been testified to, had not been identified have been circulated to the jury. And I don't know of any way at this point in time, even if they were later offered and admitted, at this point in time I have no way of guessing that. And I am going to grant the State's motion for mistrial. Yes, sir?

MR. MILLS: Not to argue with the Court's ruling, but I believe they were testified to and they were identified in front of the jury. So if that is the basis for the Court's ruling, I would just ask the court reporter to go back through Mr. Counts's testimony.

THE COURT: I am not going to ask the reporter to do that. I have kept detailed notes on exhibit numbers, and according to my notes – that is what I am relying on, these particular exhibits were not testified to and were not – I mean, they were certainly not by number. I know that for a fact. If I am incorrect on that, the record will not bear out what I am saying.

A mistrial is declared.

* * *